

2009

Modern Reports :
BEING A
CONTINUATION
OF SEVERAL
SPECIAL CASES

ARGUED and ADJUDGED in the
Court of King's Bench,
A T
WESTMINSTER,

In the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh
Years of the Reign of the late King WILLIAM; and
Judgments thereupon.

TOGETHER WITH
SPECIAL PLEADINGS to most of the said CASES.

V O L. V.

The FOURTH EDITION.

Reviewed and Corrected, and many Thousand New and Proper References
added, *never before Printed*, from all the Books of Reports, down to
the Year 1757.

By DANBY PICKERING, of *Gray's Inn*, Esq;
And Reader of the Law-Lecture to that Honourable SOCIETY.

In the SAVOY:

Printed by *Henry Lintot*, Law-Printer to the King's most Excellent Majesty; for
T. OSBORNE and J. SHIPTON in *Gray's Inn*;
D. MIDWINTER, E. WICKSTEED, D. BROWNE, J. SHUCKBURN,
J. WORRALL, T. WALLER, and T. TRYE. MDCCLVII.

T H E

P R E F A C E.

THE Reports of Cases adjudg'd in former Ages, which Bracton calls, The Judgments of the Just, are so very beneficial to the Publick, that it hath been the Care of several Kings to transmit them to Posterity; and for that Purpose Edw. 3. and several of his Successors, did, in their respective Reigns, appoint four discreet Men to Report the judicial Decisions in the great Courts of Justice, that those Judgments which were given there might be establish'd by Time and Usage, and that parallel Cases might receive uniform and certain Determinations.

THE Reporters thus appointed by the State, had a constant and fix'd Salary from the Government, as a just Reward for their Labours, which have been long since publish'd in several Volumes, called the Year-Books, containing the Arguments of Counsel at the Bar, and the Resolutions of Judges on the Bench, in a continual Course of Time from 1 Edw. 3. to 12 Hen. 8. for almost two hundred Years.

AFTER the first twelve Years of Hen. 8. this Method was discontinued. It is true, there are some Cases from that Time to 27 Hen. 8. which are bound up with the Year-Books; but Mr. Fleetwood tells us, They are collected with so little Judgment, that he did not think them worthy to be placed in the Tables which he made of those Books; and therefore composed a Table of them by itself.

IT is very remarkable, that there are no Memorials extant who these Reporters were, not so much as the initial Letters of their Names, or of what Houses they were; but it is probable by their Number, that each of them were chosen from the respective Inns of Court, and it is certain they were very industrious Men; we have my Lord Coke's Word for it, who extolls their Diligence, and metaphorically tells us, That if it had not been for their Writings, the Judgments of

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so many Sages of the Law, had, with their Bodies, been worn away with the Worm of Oblivion. *And though this may be the Fate of their Books, yet the same great Judge hath recommended them to our Reading, assuring us, That out of the old Fields, the new Corn must spring.*

1599. Plowden. *THE next, in Order of Time, was Mr. Plowden, a Middle-Temple Man, who collected two Volumes of Cases from 2 Edw. 6. to 22 Eliz. for his private Use; but having lent his Manuscript to some Lawyers, whose Clerks were so diligent, in those Days, as to sit up whole Nights to transcribe it, designing it for the Press, he therefore resolved to publish it himself, and hath assured us, That all the Pleadings are on Special Verdicts, or Demurrers; that he had the Copies of the Records, and studied the Cases before they were argued; and we have his Word for it, That for Surety of Law, his Books passed all former Reports.*

1601. Dyer. *ABOUT two Years afterwards, the Nephews and Executors of Sir James Dyer, another Lawyer of the Middle-Temple, published his Reports, being assailed (as they call it) by Men of good Countenance for that Purpose; and these were the only Reports which were published in eighty Years after the Year-Books: But we have been told, that this Defect hath been amply recompensed by the Grandeur and Authority of this single Judge; and yet his Book is composed of very short Notes, which my Lord Coke says, is less Painful, but not less Profitable, than more elaborate Works.*

1601. Keilway. *ABOUT the same Time Sir John Coke, the eldest Brother of the Judge of that Name, and who was afterwards a Judge himself, having gotten Mr. Keilway's Manuscript of Law-Cases, committed so many of them to the Press which he thought fit to publish, and told his Reader, That there he might find Multa subtiliter disputata, & summo cum judicio determinata, quæ alibi non leguntur; which is very true, for there are many Cases argued and adjudged in the Reign of Hen. 7. and his Son Hen. 8. which are not Printed in any of the former Reports.*

1601. 1 Rep. *IN the same Year, the Lord Chief Justice Coke published the first Volume of his Reports, and having for twenty Years before, observ'd the true Reasons of such Matters in Law, wherein he was of Counsel, and which were adjudged upon great and mature Deliberation; he afterwards consented to the Printing ten Volumes more, which were nineteen Years in publishing; and it is remarkable, that in all that Time there was no other Report printed; as if it became all the rest of the Lawyers*

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Lawyers to be silent whilst their Oracle was speaking. But notwithstanding the Character of this great Judge, his Works were censured even in his Life-time; for being removed from the Seat of Chief Justice of England, in Michaelmas Term, Anno 14 Jac. a Commission was granted to Sir Henry Montague, his immediate Successor in that Place, and to others, to review and reform his Reports; some Part whereof, he tells us himself, were writ in the Tempest of Business, and therefore he could not polish them as he desired.

IT is likewise to be observed, That there was not any Report publish'd in the Space of twenty-two Years after my Lord Coke's last Volume came forth; tho' he tells us, there was a flourishing Spring of Learning at that Time, and encouraged the Lawyers of that Age to follow his Example, to Register in Books the Sayings and Doings which were in their Time worthy of Note and Observation; but none would undertake it, unless it was Sir Henry Hobart, his immediate Successor in the Common Pleas, who collected a Volume of Cases adjudged in that Court, but did not think fit to publish them in his Life-time. However, it was set forth sixteen Years after his Death by an unskilful Hand; but as my Lord Chancellor Finch observed, it was Beautiful even in Confusion: And I may very well affirm, that after it was corrected by his Pen, it infinitely excels most other Books of that Kind, both in Purity of Language, and Soundness of Reason.

SOON after the Martydom of King Charles I. there came forth a flying Squadron of thin Reports, of which Mr. March led the Van, March, 1648. most of them very good; but the best of that Number are the Cases which were adjudged in that Reign, collected by Justice Croke, and published by his Son-in-Law, Sir Harbottle Grimstone, during the Usurpation; in which Time, and within the Space of twelve Years, there were twenty-one Reports publish'd in the Names of Judges, Serjeants at Law, Prothonotaries, and other Lawyers of less Characters; as may be seen in the Margin; insomuch, as Mr. Bulstrode, who was made Chief Justice of North-Wales, by Cromwell, and who was the first Lawyer after my Lord Coke, who publish'd a Report in his Life-time, complained of those flying Reports, which he compared to the Soldiers of Cadmus, daily arising, and justifying each other; and yet there were very fair Pretences made at that Time for the Publishing all these Volumes, some from the Manuscripts of judicious Persons, some from the Copies taken out of the Libraries of eminent Judges, or Serjeants at Law, where they had been long Time boarded for their private Use; but falling then into the Hands of Men of publick Spirits, and who were more communicative of Learning, they either out of

*Cr. Car. 2
Brownl. } 1651.*

Godbolt, 1652.

Gouldi. 1653.

*Poph.
Hutt.
Owen,
Noy, } 1654.*

*Winch.
Lane,
Herley,
Bulst. } 1657.*

*2 Cro.
2 Bulst.
Style,
1 Leon. } 1658.*

*2 Leon.
Ley.
Bridg.
3 Bulst. } 1659.*

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a hearty Zeal to the Common Good were willing, or by Importunities were prevailed on, to transmit them to the Press: And I remember a particular Reason was given, for Printing Justice Hutton's Reports, which was, That he being Cotemporary with my Lord Hobart, both those Judges might, like Cicero and Roscius, make one incomparable Man; which (by the Way) was no very good Compliment to either.

IT is true, the Fertility of the Press was, even at that Time, accounted a Fault; but it was in a reforming Age, which made Lawyers consult the Scriptures, that they might, with Authority, reject all those spurious Births without living Fathers; which is the best Character Mr. Style gave them, and who had as little Reason as any Man to express himself in that Manner. But he is the Person who tells us, These Reports spoke so plain, in the Language of Absurd, that a wise Man could never believe they sprang from Israelitish Parents.

1661. { Yelv.
Cro. El.
Bendl.
1662. Latch.
1663. Moore.
1664. 1 And.
1665. 2 And.

SOON after the Restoration of Car. 2. a Check was given to the Press by a Statute, prohibiting all Law-Books to be printed, without the Licence of the Lord Chancellor or Keeper, the Chief Justices of each Court, the Chief Baron, or one or more of them, or of one by their Appointment: Which Act, after several Continuances, expired in King William's Reign.

1675. { Jones.
1 Roll.
4 Leon.
1676. 2 Roll.
1677. Vaugh.
1678. Palmer.
1682. 1 Mod.
1683. 5 1 Sid.
2 Lit. Rep.

BUT in Conformity to this Law, most of the Reports which were printed, whilst it was in Being, were licensed by the Chancellor and Judges, only the First Part of Lord Anderson's Reports, and the First Mod. had not that Advantage; for an Advantage it must necessarily be in many Respects, for any Book to come forth with so great a Solemnity. Notwithstanding, Serjeant Maynard, in his Argument of the Special Verdict between Hitchens and Bassett, in B. R. 1648, citing a Case taken by himself fifty Years before, told the Court, It was of as good Authority as any which had been printed since; which takes in every Report of my Lord Coke's.

2 Sid. 1684.
3 Keb. 1685.
Saund. 1686.
Alecyn, 1688.

IN the Reign of Jac. 2. there were seven Reports published, some of them inferior to none before: But I cannot help taking Notice, That some other Reports, at that Time, were licensed in a very unusual Manner a Year after the Books were printed, with the bare Allowance only of the Impression, without certifying to the World (as is usual in such Cases) the great Judgment, Learning and Wisdom of the Author.

The PREFACE.

AFTER the Revolution, and during the Reign of King William, and his late Majesty, there have been thirteen Reports published, most of which (to express my self in my Lord Coke's Words) set open the Windows of the Law to let in the glad some Light, whereby the Reason thereof may be clearly discerned. And though some of them, as Justice Shelley merrily said, might be compared to Banbury Cheeses, whose Superfluities being pared away, there would not be enough left to bait what my Lord Hale called the Mouse-Trap of the Law: Yet to speak still in the Language of a Judge, I think the meanest of them may like the little Birds, add something to the building the Eagle's Nest.

Hardres, 1693.
Jones, 1695.

* Preface to
6 Rep.
Vent. 2. 2
Rayn. 1696.
3 Mod. 1698.
1 Mod. 1700.
Levinz, 1702.
4 Mod. 1701.
3 Lutw. 1704.
Shower, 1708.

† Preface to
8 Rep.
5 Mod. 1711.

AND thus I have given an Historical Account of our Reports, which a Country Lawyer (who was afterwards advanced to the Seat of Justice) told the Bar, were too Voluminous: For when he was a Student, he could carry a compleat Library of Books in a Wheelbarrow; but that they were so wonderfully encreased in a few Years, that they could not then be drawn in a Waggon.

WHAT would he have said, if he had look'd into the Codes, the Pandects, the Institutes, the Novels, and a vast Number more of Glosses and Explanations of the Civil Law, not only by the old Commentators, but by Budæus, Duaren, Tiraquill, Hottoman, and many more of the last Century? And if this grave Lawyer accounted eighty Volumes of the Common Law Reports to have been too great a Number, though they have been almost four hundred Tears in publishing, certainly he would have been amazed at the Theodosian and Justinian Codes, the Capitularies, the Decrees and Decretals, the Orders and Constitutions of Bishops, the Cursus Canonicus, the Clementines, Concordates, and an infinite Number of Volumes of the Canon Law, too tedious to be repeated.

I shall only add, let the Volumes of Law-Books be what they will, the Sufficiency of every Author must appear from his Works, and not from his Picture before the Title Page, or from any other artificial Embellishment there, which was never attempted by the Publisher of these Reports who was induced to commit them to the Printer, being assured long since, by a most learned Judge, that this Way of Reporting is the most perspicuous Course of teaching the Law.

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IT is a Satisfaction to him who is in Obscurity, to see some of his Labours accepted by the Publick, who would likewise be very well pleased to see those who censure them, attempt something of this Nature themselves; and therefore will conclude this Preface to his last Report, as my Lord Coke did that of his first:

Cum tua non edas, his utere, & annue, Lector,
Carpere vel noli nostra, vel ede tua.

Note, The Fourth Part is intitled
the Last, by Mistake.

W. N.

A TABLE

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To restore a Man to be Benefactor of a Corporation Page 254

To the Commissioners of Appeal upon
the Duty of Facile

a Court-Leet 2 224

Transfer.

2414 401

Markt' inde

*Le Wager is
determined
per le Groom-
Porter.*

*Le fait sur
que l'Action est
founded.*

*Et l'Action
de Groom-
Porter est
Ques.*

*Et l'Action
de Groom-
Porter est
Ques.*

Oyez de fait.

norationis illius [Anglice of that Wager] posuere se super Judi-
cium Atrienfis Angliæ [Anglice of the Groom-Porter of England]
Cumq; præd' Johannes St. eisdem die & Anno supradict' apud Pa-
roch' præd' per scriptum suum sigillo suo figillat' curieque Dom'
Regis & Dom' Reginæ nunc hic ostens. cujus dat' est iisdem die &
Anno cognovit pignoration' præd' [Anglice the said Wager] Et
præd' J. St. per idem scriptum obligavit seipsam solvere præfat'
L. P. vel eadem hoc centum nunciat ad ea [Anglice vocat Guineas]
quando Atrienfis [Anglice so soon as the Groom-Porter] adjudi-
caret [Anglice should give his Judgment] in casu illo si accideret
quod iudicium illud foret contra præd' J. St. Leiger. Et in eodem
idem Rogerus dicit quod postea post confectionem scripti præd' &
ante impetration' brevis originalis præd' Rogeri in Cur' hic scilicet
31 die Julii, Ann' Dom' 1691, supradict' quidam Thomas Neale
Armig' tempore confectionis scripti præd' & diu antea & abinde ad-
huc existen' Atrienfis Angliæ [Anglice the Groom-Porter of Eng-
land] in casu præd' adjudicavit contra præd' J. St. Leiger scilicet
quod præd' Rogerus non tenebatur jure solvas illas amovere [An-
glice to play] duos Latrunculos illos quos ita movisset nisi movis-
set illos a Statione sua [Anglice off from the Point] quodque cen-
tum nummi aurei [Anglice vocat Guineas] tempore confectionis
scripti præd' & diu antea fuer' & adhuc exist' valoris præd' centum
& septem librarum & decem solidorum scilicet apud Paroch' præd'
in Com' præd' unde præd' J. St. Leiger ad hunc & ibid' habuit noti-
tiam præd' tamen Johannes St. Leiger licet sæpius requisit' præd'
centum & septem libras & decem solidos eisdem Rogero non reddidit
sed ill' ei hucusque reddere omnino contradixit & adhuc contradicit
unde dicit quod deteriorat' est & damnum habet ad valentiam 40 L.
& inde præd' sciam.

Et præd' Johannes per E. H. attorn' suum venit & defend' viam
& injur' quando, &c. Et petit auxilium script' præd' & ei legitur
in hac verba scilicet. I John St. Leiger of, &c. do hereby certify that I have
written with Lieutenant Colonel Roger Pope an hundred Gui-
neas against One hundred and fifty, containing a Receipt scrib-
ing on the manner of playing a Card at Back-Gammon, which
is signed and signed by us both, and Captain Francis Chantrell,
and referred to the Decision of the Groom-Porter of England.
And I do by these Presents obligate my self, on the Honor and
Reputation of a Gentleman, to pay to the said Roger Pope, or his
Order, or whom he appoints to receive it, an hundred Guineas,
as soon as the Groom-Porter gives his Judgment on the Case,
if it is happen that the Judgment be against me: The Que-
stion to the Groom-Porter is asked under the Letters A. B.

and

Betted] per eund' Johannem cum præd' Rogero & perdit' in Lusu illo & non cum vel pro pecuniis deposit' [Anglice ready money] quodq; præd' centum nummi aurei vocat' [Guineas] tempore pignorationis illius [Anglice at the time of the said Bet] necnon tempore adjudicationis in narratione Rogeri præd' per Thomam Neale in eadem narratione mentionat' fieri supposit' fuer' valoris ultra summam centum Librarum (videlicet) valoris centum & septem librarum & decem solid' superius petit' videlicet apud Paroch' præd' in Com' præd'. Quodq; præd' centum nummi aurei tempore Lusus illius non fuer' pignorat. [Anglice Betted] in pecuniis deposit' [Anglice ready money] neque tempore adjudicationis præd' in narratione præd' fieri supposit' solut' sed pro securitat' solution' præd' centum nummor' aureor' per ipsum Johannem cum præd' Rogero ut præfertur pignorat. [Anglice Betted.] Idem Johannes postea scilicet præd' 8 die Julii An' Dom' 1691, supradict' apud Paroch' præd' in Com' præd' scriptum præd' in narratione præd' mentionat' præd' Rogero dedit sigillavit & ut factum suum deliberavit per quod ac vigore Statut' præd' in eo casu inde edit' & provis' scriptum præd' fuit & est vacuum & nullius vigoris in Lege. Et hoc paratus est verificare unde petit judicium si ipse de debito præd' virtute scripti præd' onerari, &c.

C. Levinz.

To this the Plaintiff, Roger Pope demurs generally.

Fr. Pemberton.

This was adjudged for the Plaintiff in B.C.

St. Leiger versus Pope. B. R.

On a Writ of Error on the Judgment given in the Common Pleas for Pope, the now Defendant: It was argued,

Boderick for the Plaintiff in Error: The Plaintiff in Debt demands 100 Guineas, valoris 107 l. 10 s. in B.C. The Defendant pleads, That when the Wager was laid, he and the Plaintiff were at a Play called Back-Gammon, and pleads the Statute of Gaming, and shews that this was for Money won at play at Tables, being for above the Sum of 100 l. and so was void by the Statute; to which the then Plaintiff demurs, and Judgment was given for him in the Common Pleas: And we bring Error:

Debt for a
Wager, the
Statute of
Gaming
pleaded.

Skin. Rep.

572.

Vide post.

131, 175.

3 Lev. 118.

2 Vent. 175.

the Value of such Sum or Thing so won.

Persons winning above the Sum or Value of 10 l. at one Time or Sitting, shall forfeit five Times the Value of such Sum or Thing so won. 9 Ann. c. 14. § 7.

1. J

1. I think Debt will not lie on this Wager, &c.
 2. The Plaintiff ought not to declare of so many Guineas, Valoris, &c. Yelv. 80. 2 Cro. 88. 1 Leon. 41. Those Cases I agree: But here a Guinea is English Money, of which the Court takes Notice; and in such Cases it is never declared ad Valentiam, Latch. 84. A Guinea in Law is no more than 20 s. but in an Action on the Case, Damages shall be given for them according to the Value; but in Debt for them, the Plaintiff never declares for more than 20 s. and so you lately adjudged in this Court, in the Case between Harrison and Byron: In which Case it was adjudged, 1. That the Court judicially takes Notice of a Guinea. 2. That the legal Value of it is but 20 s. though by Consent it may pass for more; so that this Judgment is erroneous.

1 Saund. 316. The Deed being entered of Record, is Parcel of the Plea; and if by that it appears that the Plaintiff hath not Cause of Action, he cannot have Judgment though the Defendant has misbehaved himself; and therefore our Admittance of the Value of the Guineas will not hurt us, and we need not to have mentioned this Variance from the Deed; and this was a Point not touched in the Common Pleas.

Then non constat in what Case (in Casu illo) for it is not mentioned before, and the Money is not to be paid by the Deed, before the Groom-Porter has given Judgment in that Case; and as to that, the Declaration is, That Pope stirred two of his Tablemen, Sed non amovit illos a Statione sua, [Anglice from the Point they stood on:] And a Wager was laid, Whether the said Pope was bound by the Law of the Play, to play those Men which he so stirred? And they put it to the Determination of the Groom-Porter, Cumq; præd' J. St. Leiger (die, anno & loco) per scriptum suum sigillat' curiaq; Dom' Regis & Dom' Reginz nunc hic ostens. cujus, &c. cognovit pignorationem præd' [Anglice the said Wager] Et præd' J. S. per idem scriptum obligavit seipsum solvere præfat' R. Pope vel ordini suo centum nummos Auroos [Angl' vocat' Guineas] quando Actiensis [Angl' so soon as the Groom-Porter] adjudicaret [Angl' would give his Judgment] in casu illo si acciderit iudicium illud fore contra præd' J. St. Leiger: In casu illo: In what Case? For it is not mentioned before, and the Money is not to be paid by the Deed, before the Groom-Porter has given his Judgment in that Case.

Then our Plea is good, for we plead the Statute of Gaming, and that being at Back-Gammon, these Hundred Guineas were wagered on that Game; and so not being for ready Money, it is void by the Statute: Now we may aver by the Statute

How to declare for Guineas in Debt or Case.

Vide 1 Salk.

9. 22, 23.

445.

Pal. 497.

2 Keb. 463.

post. 7.

Rast. Ent.

158. b.

Cases in Law and Equity,

312.

A Deed entered of Record, is Parcel of the Plea.

Vide 1 Saund.

316, 317.

Cases in Law and Equity,

336, 337.

Ant. 2d line

Where a Man
may sue
against his
own Debt.
Vide Lutw.
734, 735.
N. Lutw. 232,
233.
1 Salk. 162,
197, 227.
2 Salk. 676.
6 Mod. 306.

Statute of
Gaming con-
strued liberal-
ly.

against our own Debt, 1 Cr. 293. Mo. 641. 2 Sid. 88. and the Defendant hath confessed this. And though the Statute is not good, yet it appears by the Declaration to be within the Statute and Intention of the Statute of Gaming, for the Money is above 100*l.* and is lost on Ticker; and it appears by the Declaration how it was lost, that it was at Back-Gammon, and that the Money was won at Play of that Game, though the Judgment of the Common Pleas was at another Time; and the Statute of Gaming would be of little use, if it is not extended to By-Bets, but only to the Gaming itself, and this *Ad* has always been construed liberally. And therefore where a Man lost 80*l.* at one Day, and then the Parties agreed to play at another Day, when 90*l.* more was lost; this was adjudged to be within the Statute, and to be but one Loss; and that Statute was made to prevent great Wagers. If any of these Points are for us, then I pray that Judgment may be rendered.

Chief Justice. Do you make laying a Wager to be within the Statute of Gaming? It is true, they were at Play when the Wager was laid.

Eyre, Justice. Suppose that the Wager had been, that the Tables were made at Brazil, had this been within the Statute? Certainly no: No more shall this.

Whether a
Wager be
within the
Statute of
Gaming.
Vide post. 113.
175.

The Nature
of Guinea,
and how the
Law takes
Notice of
them.
2 Salk. 446.

Pemberton, Sergeant. It is plain, that this is not within the Statute of Gaming; for to make it so, it must be betted on the Hand of the Plaintiff or Defendant; but this Wager was laid on a collateral Matter on the Right of Play, which is not within the *Ad*.

As to the Declaration, The Plaintiff produced evidence to, for it is the very same with the Declaration. Then he lay to, that the 100 Guineas are worth 107*l.* 10*s.* of which you must take Notice, for it is a Coin by Act, and is not any more tender of Coin of the Kingdom, as the 50*s.* Piece was, for there is no Proclamation to make them good; but a Guinea is in Nature of a Medal, and is more like a foreign Coin, and is much of that Nature. And there are several Declarations of so many Dollars, values so much, and yet you know the Value of a Dollar. This is like that, which you cannot take Notice of, because it is not the current Coin of the Kingdom.

Holt,

Holt, Chief Justice. Guineas were coined at the Mint for 20s. only, and there was never any Proclamation to make them pass, though there was one to take the Twenty Shilling Pieces. 'Tis true, by Consent they may pass for more than 20s. but legally no more is to be demanded for them than 20s. the Guinea was coined according to the Twenty Shilling Piece; we call them Guineas by Agreement; but how can we take Notice of what Value they are? If the Plaintiff had declared of Twenty Shilling Pieces, we must have judicially taken Notice of them: But do you think that it is not High Treason to counterfeit Guineas? Certainly it is: Though the Indulgent shall not run for counterfeiting Guineas, but of so many Pieces of 20s. Value. A Guinea is the current Coin of the Kingdom, and we are to take Notice of it. The Guineas were coined after the Proportion of Charles's (that is) Sixteen Penny-weight less, to the Value of 20s. only: The Question is, If we can take Notice of the Allegation of the Value of Guineas, because there are other Sorts of them, as Five Pound Guineas?

Where you declare on a foreign Coin, you must declare in the Debet only, and not in the Debet: So in an Action of Debt for Goods, as Coin, &c. though Debt lies on the Contract, yet it must be in the Debet only, and the Value must be set out; it is always so, unless the Debt be for English Money. Now these are called Guineas here, which if it were a Coin not known in our Law, we must take them to be as Goods.

Eyre, Justice. Then the Defendant confesseth the Value of them as the Plaintiff hath alleged.

Holt, Chief Justice. But it is centum nummos aureos, [Anglice Guineas] What is that? It is very uncertain indeed; if it had been centum pecias Auri, [vocat Guineas] it had been well enough. Adjourn.

But in Trin. 7 W. 3. (the Chief Justice and Justice Eyre only present) the Judgment was reversed, chiefly for this Reason, because the Plaintiff had named the Case, Plea, and Answer, and then the Deed by which the Parties bound themselves in perambulations made, and upon Oath of the Deed it appears, that it was so found in the Judgment of the Groom-Poorer, upon the Case stated and signed by us both, which is not the same: And therefore the Writing comprehending the Case, and Judgment taken, that the Case in this and in the Declaration

Vide 2 Salk.

446.

Ante, 5.

1 Salk. 9, 12,

25.

How to declare on Foreign Coin.

Vide ante 5.

& supra.

Modern Cases

in Law and

Equity.

12 Barr. 57.

187.

claration are all one, and although that the Inducement of the Case and this Verdict are all one, and therefore whether the Inducement be before the Deed or after is not material, yet the Chief Justice was of another Opinion, because the Declaration supposed the Deed to be, to perform a wager compassed in the Deed, where it is to perform a Case extrinsecal, and which is to be coupled by Averment.

B. C. 2 Salk.
367.

Waytes versus Briggs.

This is an Action of Debt on Escape.

Vide Hob.
210.
Mo. 888.
1 Sid. 216.
1 Lev. 137.
1 Keb. 761,
815.
Show. 4.
6 Mod. 102.
1 Salk. 298.
Conclusion of
the Plea *prout*
patet per Re-
cordum,
where it is
Matter of
Form or not.
See now the
Stat. 487
Actum, cap.
16.
For Amend-
ment of the
Law.

IT is said, That the Prisoner was brought before Mr. Justice Gregory, and by him committed. It has been objected, because we do not conclude *prout patet per Recordum*.

Hall. I conceive this is good on a general Demurrer, and is within the Stat. 27 Eliz. of Demurrers, because it is but Matter of Form, and is within the Rule laid down in Hob. 233. and within the Reason of it too; and on the Trial, the Commitment must have been given in Evidence. 1 Sid. 429. is in Point. Hancock & Prowd. 1 Saund. 336. Debt on Bond against Executor. Defendant pleads several Judgments in Bar, *ultra quod*, &c. Plaintiff replies, *quod placitum præd' est minus sufficiens to bar him*, because upon one of the Judgments (naming it) Satisfaction is acknowledged; and as to the others kept on Foot by Fraud, *Et hoc paratus est verificare*, without saying *per Recordum*. *Et per Cur'*. It is good on a general Demurrer; otherwise upon a special Demurrer: And Judgment was for the Plaintiff.

Chief Justice. It seems but Matter of Form, and so it was adjudged twice in the Case of Hancock and Prowd in 1659, and between Clegat and Banbury. 2 Sid. 16.

Eyre, Justice. The alleging of the Commitment, is but Inducement, and not the Point of the Action. I think the Case in 1 Sid. 216. Middleton and the Mannaptors of Silvester is in Point, and this is but Matter of Evidence. Where the Record is the Substance of the Plea, there it must conclude *prout patet per Recordum*; but where it is but Inducement, it need not; for which there is a good Difference in Co. Lit. 303. 2. where a Matter of Record is the Foundation or Ground of the Suit of the

1 Lev. 137.
1 Keb. 761,
815.
Combertach
299.

the Plaintiff, as of the Substance of the Plea, there it ought to be certainly and truly alleged; *alter*, where it is but Consequence; and so in this Case.

Holt, Chief Justice. In Debt on a Judgment, it is said, quod cum recuperasset, &c. And though it is not said prout patet per Recordum, yet it is good, and so it has been held, for it was but Inducement, and yet it is agreed, that in such Case the Defendant may plead nul tiel Record.

The Escape is the Gift of the Action, and the Commitment is but the Inducement to it, tho' it can be no Escape without it; but the Record is not the Matter of the Action; (but the Escape was) for then the Plaintiff ought to have concluded prout patet per Recordum; but here the Omission of it is but Matter of Form, for it ought to have been given in Evidence on nil debet pleaded, which is the Plea for the Defendant in this Case, because the Gift of the Action is grounded on Matter of Fact, and not on the Record; for if it was, then the Plaintiff could not plead nil debet as it, but only nul tiel Record.

Eyre, Justice. The Defendant is not escaped to say, quod the Prisoner non fuit committitur, though it is said on the Record, quod committitur: And per Chief Justice, The Record is only alleged to make it an Escape; and tho' the Record is proven, that does not make it an Escape only.

Northey. In last Hill Term in B. C. in Debt on Escape, it was not said prout per Record. and the Court on the first Argument were of Opinion, That Judgment should be given against the Plaintiff; but afterwards considering that the Defendant's Plea had admitted the Commitment, Judgment was given for him.

Curia. That Case is no Authority for you.

Judgment for the Plaintiff, nisi, &c.

The Earl of Bath versus Bathersea.

Sol. Gen. **T**HE Depositions which were read against my Lord of Bath in the other Cause, are no Evidence in this, because that Trial is not between the same Parties; and Depositions are never Evidence but where they are mutual; and this Defendant does not claim under any one that was Party to the former Suit.

Cur. They may be read because the Defendant shelters himself under the other's Title, and the Title of the Land is not in Question, but to whom the Rent shall be paid. If the De-

D

Defendant

Difference in Pleading as to Matter of Inducement and Substance.
1 Saund. 9.
10, 268, 269.
Vide 1 Salk.
320, 555, 630.

Reg. 413.
415.

Cases in Law and Equity
25.
Carthew's Rep. 145.

Vide 1 Salk.
278, 281, 286.
2 Salk. 555,
691.

Depositions in one Cause, where they are Evidence in another, or not.

Vide 1 Chan. Cases 73,
175, 236.
2 Chan. Cases 250.

Reg. 277.
Rep. of Cases in Equity 151,

152, 155, 156. Cases in Law and Equity 19, 20. 1 Vern. 53, 161, 254, 308, 366, 367, 413, 452.
2 Vern. 517, 555, 603. Mod. Cases in Law and Equity, 1st Part, 181.

Answer in
Chancery read
in Evidence.
Vide Chan.
Cases, 154.

Defendant gives the Plaintiff's Answer in Chancery in Evidence, he may insist only to read such Part as he will, for it's like Examination of Witnesses; but then the other Side may insist to have the Whole read over.

Nota, There was a Verdict for the Plaintiff in this Cause after a Trial from nine o'Clock in the Morning till nine the next Day: And the Judges sat up all Night long.

Vide post. 276,
277.

Mandamus.

1 Salk. 433,

436, 7.

Mandamus to

restore nine

Common-

Councilmen.

Vide 6 Mod.

18.

Show. 258,

260, 281,

364.

The King versus the City of Chester.

THIS was a Mandamus to restore nine Persons to these Places of Common-Councilmen in Chester.

They return, That by Charter granted to them in 20 H. 7. amongst many other Things of which they take no Notice, they are impowered to choose forty Common-Councilmen yearly, and that ante adventum of this Writ, these nine Persons were chosen Common-Councilmen, and so continued for a Year; and that at the End of the Year, debite amoti fuere ab officio per electionem aliorum.

Carthew 173.

Sir Tho. Powys. This is no good Return, because it does not set forth any certain Time when these Persons were chosen or removed; and in Returns to Mandamus's, there ought to be the greatest Certainty, because it is the Ground of the Judgment of the Court, and are to conclude the Party, who has no Opportunity to plead to them, and therefore they must be positive too, that if they be false, the Party may have his Action. Now to say, that these nine Persons were ante unum annum integrum ante adventum brevis chosen and removed, is altogether uncertain; for it may be forty Years ago, and yet the Return is true; and if we bring an Action on this Return, we cannot know what certain Time they meant.

2. They say, That the Year being ended, debite ab officio amoti fuer. which is not good; 1 Sid. 209, 210. for it ought to be direct and positive: Non fuit debito modo admissus is an ill Return of a Mandamus; it ought to be Non fuit admissus. H. brought a Mandamus to be restored to the Place of Town-Clerk of Hereford, the Mayor returns, Nunquam fuit debito modo admissus; it is ill: He ought to have returned Non est admissus; for if the Return be false, the Party grieved may have his Action on the Case.

A Person suing out a Mandamus may plead to, or traverse all the material Facts contained within the Return.

9 Ann. c. 20.
§. 2.

Curia

Curia. The Case of Amotion, or Putting out, differs from the Matter of Election. There is Difference between debite amotus fuit, and non fuit debite electus; for this Case, and all others of like Nature, admit that he was removed; but in Case of Election the Mandamus is to admit him, and therefore in the Return it must be shewed non fuit electus positively, and must not say, non fuit debite electus, for that implies an Election; but it was not according to the Constitution of the Corporation, and therefore in such Case the Return ought to have shewed how he was elected. But in this Case all are agreed, That he was removed, and they say that it was duly done, and shew the Reason of it; but the Return ought to have shewed what Time they were elected.

And here you ought to have brought several Mandamus's; for nine Persons cannot join in a Mandamus as here; perhaps you were chosen at nine several Times. You cannot all join in one Writ; for the Election of one is not the Election of another.

Eyre, Justice. They may alledge a Custom to choose a Common-Councilman, and to turn him out ad libitum, and that is Warren's Case; for he has no Freehold in his Place, as an Alderman hath; for a Common-Councilman is collateral to the Corporation.

Holt, Chief Justice. The Return is too short; but we will not restore you on this Writ: Agree to take a Declaration, and try it next Term on the Merits.

This is an Innovation to join nine Men in one Writ of Mandamus: Can we grant a joint Restitution to them? It is a several Interest.

Tenants in Common cannot join in one Action, though they come in by one Feoffment; the Amotion of the one is not the Amotion of the other; and it may be for several Faults, one for Forfeiture, the other for other Reasons. I think the Writ ought to be quashed.

Eyre. And so do I.

Green versus Moore.

THE Case was this. The Declaration was in Trinity Term; Defendant impails till Michaelmas Term. In the Declaration the Plaintiff was outlawed, and then in Michael-

Diversity between Amotion and Election as to the Return.

Fide 2 Salk. 428, 433, 434, 435. Carthew 170, 171.

1 Salk. 433.

Difference between a Common-Councilman and an Alderman.

Fide 1 Vent. 19, & 302. 2 Keb. 488. 3 Keb. 714. Comber. 307, 308. Mod. Cases in Law and Equity, 1 Part, 209.

If Plea of Outlawry after Imparance be good, without saying *quis duxerit* Continuance.

Can they contend that the Defendant is not a Common Dealer, who is liable to pay on a Bill of Exchange?

The King versus Wadsworth

COUNSEL moved to quash a Judgment against a Defendant for taking too great Oath, because he was not a Juror nor Oath, nor the Jurors named in the Oath, and that the Court is against the Court to quash on Judgment against Extortion or Oppression; we cannot do it. Demur to it.

Extortion,
Hawk. P. C.
170, 171.

It is against
the Oaths of
the Court to
quash an In-
dictment a-
gainst Exor-
tion.
Comb. 64.

Walker versus Walker.

COUNSEL moved in Arrest of Judgment, because the Action was for Money won at Play on a Wager, by a general Indebitatus Assumpsit, which is not a good Promise in Law: for there is no Debt, and the Verdict being general and entire, Damages given cannot be good. There are Cases on both Sides, and the Point is now depending in a Cause in the Exchequer-Chamber.

Vide ante 3,
6, 7.
3 Lev. 118.
2 Vent. 177.
4 Mod. 409.
Comb. 303.

Econtra. Though it is, yet in Egleston's and Lewen's Case, 3 Lev. 118. Hill. 33 & 34 Car. 2. in Sir Fr. Pemberton's Case, a Judgment in this Point was affirmed.

Holt, Chief Justice. It was so: But since we came hither we have held the contrary, that it does not lie: It is merely a Wager, and no Indebitatus Assumpsit lies for it; for to make that lie, there must be a Work done, or some meritorious Action for which Debt would lie; but it does not for this Wager, because this is due in a collateral Respect: It is true, the Cast of a Die alters the Property if the Money be staked down, because it is then a Gift on Condition Precedent, and an Indebitatus Assumpsit lies against him that holds the Wager, because it is a Promise in Law to deliver it if won. See 1 Cro. Sand's and Trevilian's Case. If a Man says to a Surgeon, Cure such a Man, and I will pay you; a good Assumpsit lies upon that, because it is an original Contract, and there is a Labour done in the Way of his Profession. No Indebitatus Assumpsit lies on a Bill of Exchange, and a Judgment was stayed on that Point in my Lord Hale's Case, and the like in the Exchequer; and it is not material, whether be against whom the Bill is drawn had Effect

Vide 6 Mod.
128.
1 Salk. 22, 23.
A general In-
debitatus As-
sumpsit lies not
for Money
won at Play.
But it lies
against him
that holds the
Wager.
Vide ante 5,
6, 7.
Fitzgib. Rep.
302, 303.

No Indebita-
tus Assumpsit
lies on a Bill
of Exchange.
Vide 1 Salk.
125.

Fide p. 48. in his hands when he accepted the Bill, &c. It is not like a Liberator to pay Money on a Bill, when the Owner has the Money, the Property of it is vested out of the King, and is in the Party. I am sure my Lord Chief Justice Pollexfen was of Opinion, that that Intendment in Eggleston and Leven's Case was not well attended. As it says, we will speak with the Judges in the Exchequer Chamber, after this Term, if it could be any ways made good, he would do it, but a Clerk cannot make that good which is bad in Law. Though on the 10th of the Illager, the Defendant has promised the next Day to pay it, yet an Assumpsit would not lie on it, because it wants Consideration, it being but Executory. Adjourn.

2 Lev. 118.
3 Danv. 58.
pl. 12.

2 Lev. 118.
4 Mod. 409.

Walker contra Walker

COUNSEL. In this case the Defendant has promised to pay the Plaintiff a sum of Money, but he has not paid it. The Plaintiff has brought an Assumpsit against him, and the Defendant has pleaded that he has not promised to pay the Plaintiff any Money. The Court has given judgment for the Plaintiff, and the Defendant has appealed. The Court has now to consider whether the Defendant has promised to pay the Plaintiff any Money. The Court has given judgment for the Plaintiff, and the Defendant has appealed. The Court has now to consider whether the Defendant has promised to pay the Plaintiff any Money.

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D E Term. Sancti Hill.

Anno 6 Will. & Mar. in Banco Regis.

The King versus Crosby.

CROSBY was indicted for high Treason, and at a Trial at Bar, Aaron Smith was ready to give Evidence against the Prisoner; When he produced the Record of Smith's Condition and Judgment to stand in the Pillory, and had stood in it, which his Counsel objected, made him infamous, and disabled him to be a Witness.

Ward, Attorney General. This does not take away his Evidence; the Cause for which he was convicted, was only giving Instructions to Stephen Colledge to be used by him at his Trial; but there was no Publication of them, and it was not a Cause that defected the Pillory.

Holt, Chief Justice. The Cause is not material if the Court had a Jurisdiction; if he stood on the Pillory, and suffered an infamous Punishment, the Question is, If he be a good Evidence?

Trevor, Solicitor General. It is not the putting in the Pillory, but the fact for which he was convicted, takes away his Evidence; as Perjury, and not a Libel only, as here.

Holt, Chief Justice. It is the infamous Punishment, and not the Cause. If one is convicted of Perjury, and stands in the Pillory for it, if he gets a Patent of Pardon, it does not restore him to his Liberalem Legem. Here has been a general Pardon; the Pardon does not revive his old Credit, but it gives

[ni]

S. C. 1 Hall
467, 468,
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Termino Pasche

Anno 7 Will. III. in Banco Regis.

The King versus Bethel

BETHEL was indicted at the Old Bailey for having
 taken the King's Prisoner, and being
 at the Court of a private Person, to the King's
 Displeasure for that Offence, or before any Bench
 of the King, and the Prisoner being then in the King's
 Bench, he moved for an Habeas Corpus, and being brought up
 by the Sheriff of Newgate, it was moved in Behalf of his Bail,
 that he being now in Court, may (as he also desired) surren-
 der himself in Discharge of his Bail, and be committed to the
 Marshalsea.

E. C. 1 Salk.
 348.
 2 Salk. 1 Salk.
 149.
 1 Mod. 118,
 224.
 2 Jo. 13.
 3 Salk. 342.
 1 Sid. 78.
 Style 147.

COUNSELLOR. You cannot discharge the King's Prisoner without
 Leave of the Court: It was so held in Ollyton's Case: We
 know very well the Meaning of turning him over to the King's
 Bench Prison.

King's Pri-
 soner not to
 be charged
 without Leave
 of the Court.

SIR B. SHOWN. Then we hope we shall be discharged on these
 Exceptions to the Return.

It does not appear by that, that there was any Commitment
 of Bethel: It is said, he was committed virtute ordinis qui sequitur,
 which was, that being convicted and fined 1000l. remanent in
 custodia Carceris de Newgate quousque, &c. Now it ought to have
 said, That he was in Execution before, and that then he was
 charged for this Fine: or that he was present in Court, and
 committed by the Court for the Fine, as it ought to be where
 the Commitment is by Commissioners of Oyer and Terminer.
 And we are at Liberty to take these Exceptions on a Return to
 an Habeas Corpus, as well as on a writ of Error: Vaugh. Rep.
 Bethel's Case.

Commitment
 for a Fine.

Comber. 125.

Vide 1 Mod.
 119, 184.
 Vaugh. 135.
 2 Jo. 13.

Northey.

Ward, Attorney-General, contra. The Court is of the opinion of the Court, that it is not sufficient, for this purpose, to show that there is a Commission for him. The Commission is not sufficient, for there must be a return, as that has been shown by the Court of the Court, that it does not appear to be that in Court, or that being in Court he was committed by them for this fine.

Ward, Attorney-General, contra.

Vide 1 Sid. 78,
143,
1 Feb. 146,
301, 314,
Comber. 293,
294.

In Returns by an Officer, if there does appear a sufficient Cause of Detention, the act of his Captain, yet it will be sufficient, for the Commission is, that he is in Prison for a Cause that is not lawful, and here the Master returns, that here is Judgment against B. and a fine, and that he is in Prison for that Cause, which is a sufficient justification of the Cause, though it is not exactly such good commitment.

Mak's Pl. Co.
1 Vol. 284,
2 Vol. 144.

Trevor, Solicitor-General. The the Return is not so formal as it might have been, yet it is good in substance, for the Officer is a sufficient Judgment of a Commission, for the Remonstrance as well as to his putting in Prison, and his continuing there, if he was there before, and answers to a new Commitment of him for this Detention and Fine.

Level, Sergeant. This is only the Certificate and Return of the Court, and not the Return of the Judgment of the Court, it is not fraudulent, but must be taken for Truth, which answers the Intent of the Habeas Corpus.

Cowper. 1. It appears, that Bethel had committed by sufficient Authority, by Commissioners of Oyer and Terminer, which is in Court.

2. There is a sufficient Cause of Commitment, appears on Commitment and Fine of 1000 L. and this is a Return of the Judgment, which if it be in as here, it is erroneous, but they cannot take Advantage of it now, here is only returned the Cause of Detention and Commitment to Prison. In Bethel's Case there was no sufficient Cause of Commitment. Returns must not be so correct as when made, it is sufficient if the Return will stand as such as to make the Detainer lawful, as it here by Remonstrance, which would not be unless he had been in Prison before.

Showers.

It does not appear to us that Bethel was in Execution; for a Commitment to the Gaoler, is not any Commitment in Execution; but it must be to the Sheriff, for the Gaoler is but an Officer; and it makes no Difference that this Commitment was in Court; for the Commitment there is in Lieu of Process. We in this Court cannot

Chief Justice S. This is a Case of Consequence, and the Matter of it is prima Impression; the first Question; the Commitment ought to be to the Sheriff, as generally quousque he paid the Fine. 'Tis true, Justices of the Peace commit Prisoners to the Keeper of the Prison; but where the Court commits, it is to the Sheriff, as in their Office, to know the Prison, and where a Captive, and not to the Keeper. It is true, an Officer carries him to any Prison as well as the Gaoler, but then here he ought to know specially, that he was committed to the Sheriff for the Fine, and is now in the Gaol of Newgate under his Custody.

Then as to the Remains: Suppose he was wrongfully in Custody before, no one but the proper Officer can take him. If a Judgment be given against a Man, any of the Courts of Westminster-Hall may send a Warrant to take him in Lieu of the Court, but they could not do so if they heard he was at Charing-Cross.

Then you cannot keep a lawful Detainer on a wrongful Commitment, and you must satisfy us by the Return, that he was lawfully in Custody. There ought not only a good Cause to appear, but also a good Commitment, both as to the Form and Substance of it, for the Writ requires Causam Captionis & Detentionis, and here is only the Cause of Detention and not of the Caption; and where the Liberty of the Subject is concerned, we must be certified of the Causes. Adjourn.

At another Day.

Holt, Chief Justice. It does not appear to us that Bethel was in Execution; for a Commitment to the Gaoler, is not any Commitment in Execution; but it must be to the Sheriff, for the Gaoler is but an Officer; and it makes no Difference that this Commitment was in Court; for the Commitment there is in Lieu of Process. We in this Court cannot

Commitment
by the Court
to the Sheriff.
1 Sid. 144.
1 Keb. 308.

Commitment
to the Sheriff,
not to the
Gaoler.

[illegible]

Cover. Style 437. Is a stronger salt than that. The cover was made for a ribbon cover. It was that was taken in connection by the church, and was afterwards set at 2.50, and after that was taken in the same connection by the church. The church will have any more in the same way, the first was in the same church.

Capt. Walker. When a man comes in by Habeas Corpus, by the return of the Court he may be bailed to appear de die in diem, till the Court is returned, and then he may be committed to the next Session, and so it was ruled in Ralph Horwood's Case, who was a City Officer. By the Position of Right, we are to bail or discharge a Prisoner in three Days, but when we bail and afterwards detain him, it's no Obey; for the Court is Remittitur, and that is a Commitment granted by the Judge.

Chief Justice. No Doubt of that, after the Motion Made, but he may be remitted and brought up by Rule of Court, and in the mean Time he is in the Custody of the Sheriff, and when we give Judgment on the Motion, it has Relation to the first Day.

the Court thought it to deliver their Opinion.
 Eyre, Justice. I do agree, That the Return is not sufficient,
 but I think there is enough returned for us to commit him.
 The Return is, That he shall be such 1000 l. which is ob-
 tained; therefore I do not know the Consequence of this
 Bailing. I ground my Opinion on a Case in March's Rep. 52.
 Shield's Case. The Defendants were tried, and imprisoned
 quoad; before the Council of the Marches of Wales, on Infor-
 mation of unlawful Violence and Combination in carrying a
 Gunpowder Train to P. a Gentleman's House, and upon the Return
 the Prisoners were remanded, because it appeared that their
 Fines were not paid, without any other Bail set to the
 Masters of the Return; and if he let him at large, the King
 may lose his Fine.

This seems to be a Case prima Impressionis, and it might en-
 courage others guilty of the same Fault. Then it might rid
 all the Gaols in England, if the Gaoler's Return should be taken
 so strictly; therefore I think he must be remanded.

Chief Justice. That this Return does contain something
 not so regular, is plain; but however it does appear, he was
 committed by a Court that had Jurisdiction of the Matter.

The Law does take Notice of the Gaoler, as one that has
 the actual Custody of the Gaol, and therefore it is criminal in
 him to suffer a voluntary Escape: So Justices of the Peace
 commit Prisoners to the Gaoler's Custody, and yet at the Ses-
 sions of Oyer and Terminer, the Court takes Notice of him
 as a Servant to the Sheriff; and the Custody of the Gaoler
 is the Custody of the Sheriff.

But now the Question is, Whether we shall abate the
 Commitment upon an Habeas Corpus; or whether you are not
 put to your Writ of Error? And truly I think we cannot
 abate it on an Habeas Corpus.

This Word [Remaneat] is an improper Word; it should
 have been Committitur; but indeed they could not make him
 remain there, unless there had been a Commitment.

Besides,

1 Salk. 372.
 14 Ed. 3.
 c. 10.
 19 H. 7. c. 10.
 Cases in Law
 and Equity,
 394.
 Comber. 435.
 See 8 & 9 W. 3.
 c. 27.
 Carthew 145.
 149.
 1 Show. 117.
 Vide 1 Salk.,
 341.

Term 7 W.

...the Justice W. ... that he was called to the ...
... that he was called to the ...

The last Part of the Term died Sir G. ...
... the Judge in the Court of King's Bench, a Person of a ...
... and a good ... but most ...
... able for his Experience in Matters relating to the Justice of Peace
at their Sessions, &c. he having presided the most Part of his
Time in the Country.

The Term following Sir Th. ... one of the Justices in the
Court of Pleas, was advanced to the Court of King's Bench in his
Room.

Memorandum. This Term Sir Edward Ward, the King's Attorney
General, was called to be a Serjeant at Law, and was afterwards
made Lord Chief Baron of the Exchequer.

And Sir Th. Trevor, the King's Solicitor General, was made
Attorney General in his Place.

And in the Vacation following, John Hawles, of Lincoln's Inn,
Esq. was made the King's Solicitor General, and was knighted by
the King soon after his Return from Flanders.

D E

Term. Sanctæ Trin.

Anno 7 W. 3. in Banco Regis.

Ward *versus* Evans.

[Quere, If the Defendant's Name is not Everard, see Carthew 340.]

Pemberton, Sergeant. In Replevin, the Defendant wishes
 Conscience as Bailiff to C. H. and E. J. and says,
 That Sir Robert Carr, in 1638, was seized of the Locus
 in quo, &c. in Fee, and did by Indenture grant and demise to
 C. H. and E. J. and their heirs, (now dead) an Annuity of
 100l. per Annum, to be equally divided between them, (viz.)
 50l. to each: Habend' the said 100l. to them and their heirs
 for their Lives, (videlicet) 50l. to each of them respectively,
 and to be issuing out of the Locus in quo, &c. And that he did
 farther grant, That if any one of the five died, the Annuity
 of 50l. payable to such, should be paid equally to the other
 four, and so if two died; and if three died, that the two Sur-
 vivors should have 50l. each, but that there should be no Sur-
 vivors of either of their Parts. And further, That if any
 Part of this were Arrear, that they might distrain, Virtute cu-
 jus the five were seized of the Annuity of 50l. each, and being
 so seized, three of them died, and that their Parts devolved to
 the two living, and that the Annuity was in Arrear for several
 Years; the Arrears before the Death and Race, amounting in
 the whole to 2200l. and for 40l. the Defendant wishes Co-
 conscience. To this the Plaintiff pleads in Bar, on which I
 die is joined, which is found for the Plaintiff.

Now we make in Arrest of Judgment, that this is no good
 Conscience, because the Defendants are Tenants in Common
 of this Annuity, and therefore one Conscience cannot be made
 for both, but it ought to be several for each of them. The only
 H

Replevin by
 Tenants in
 Common.
 Fide 2. 21d.
 177.
 2. 21d. 423.

Replevin by
 Joint-tenants.
 Fide pag. 72;
 72, 73.

In Replevin, if
 a Joint-ten-
 tance can be
 made by Te-
 nants in Com-
 mon.
 Comb. 329,
 330, 347.

Diction

Question is, If a Joint-conuſance can be made for Tenants in Common?

2 Salk. 413.
1 Lev. 109.

Carthew 340,
441, 342.

There has been a Difference taken between Advoſaries, which though it ought to be ſederal, yet a Conuſance in the ſame Caſe ought to be joint: But I ſhall take no Notice of that; but this is a Gift in Common to the ſix, to be equally divided between them, (viz.) 20 l. to each, Habend' to them and their Heirs reſpectively, (viz.) 20 l. to each, for their Lives; ſo that here is a ſederal Annuity to each of them: And when all but two are dead, then 50 l. ſhall be to each of them; ſo that the Grantor intended a ſederal Annuity to them, and not a joint one, and that the Diſcreet ſhould be by them reſpectively. And they ſay in the Conuſance, that they were ſeized of the Annuity ſederally, yet now they would be Jointenants of it, and not Tenants in Common, as on the Face of the Deed they appear to be by their own ſpeaking, and are ſo concluded to be by their own Conuſance.

It is objected, That this is no more than what the Law would import from the Words of the Deed; that the 100 l. is jointly granted, and that it ſhould ſurſiſe without any Appointment of the Grantor.

Equally to be
divided.
7 Salk. 1 Salk.
226, 390.
391, 392.
p. 29.

Other Clauſes
after the Ha-
bendum and
Grant, expla-
natory of the
whole Deed.
1 Salk. 294,
5.

I will not rely on the Words [equally to be divided] which without more would not have made a ſederal Grant; but in the Exposition of Deeds, it is not unſual to conſider the Habend' and the other Clauſes after the Grant, to explain the general Intent of the whole Deed. Lit. Sect. 483. And Coke in his Comment on it ſaith, That the Habendum will alter it. Dyer 261. Fitzherbert Tit. Charge, 9. Hob. 171. 3 Cro. 25. In all which Caſes the whole Deed is to be taken together to explain the general Words of the Premises. Now here he grants 100 l. to be equally divided; but he does not reſt there, but that each ſhall have 20 l. which muſt ſignify ſomething, and muſt not be miſtaken; And ſo it is called a ſederal Annuity throughout the Deed, and not a joint one; and that three are dead, and the ſurvivors ſhall have 50 l. each, for their Lives, but that that ſhall not ſurſiſe; and though it ſhould be ſo, yet if the Grant were good to the reſt of the Tenants in Common, the Conuſance is bad; becauſe it is as well for the twenty Pounds before their Deaths, as for what has been ſerued ſince, when they have ſeized that they were ſederally ſeized of the twenty Pounds for their Lives.

And Caſe is
Law and E-
quity, Part 2.
177, 178.

And they object, That the Words [equally to be divided] do not make a Tenancy in Common in a Deed as it will in a Will: But I do not reſt on that only, for the Deed goes further, and gives 20 l. to each of them.

Then

Then they say, Though the Conscience is not good for the Whole, yet it is for Part; and if any one of the Plaintiffs have Title for any Part, he shall have a Return.

But this Conscience is not good for any Part; it is void for the Whole; for they are Tenants in Common from the Beginning. 3 Rep. Knight's Case is relied on by them, which was one Reservation, and not several, to which Case I agree; but it is not like ours, for the Reservation was entire when the Rent was once reserved; and what followed was only to shew the Rates of the Lands. But here the Grant is of 100 l. equally to be divided, (viz.) 20 l. to each; and so is the Habendum, which was not in Knight's Case, which was a Demise of divers Houses in London, for Years, rendering the yearly Rent of 5 l. 10 s. 11 d. (viz.) for one House 3 l. 11 s. for another House 20 s. Now the Reservation was compleat, eo Instanti. 4 Leon. 187, 188. has been cited too. Hill seized of a Close called Broom-Acre, and of two other Closes in Fee; he and his Wife Agatha, and Robert their Son, let Broom-Acre, and the said two Closes, to Hutchin for ninety Years, if he so long live; reddendo annuatim præd' Hill & Uxori ejus pro Broom-Acre, 3 s. 4 d. & pro una Clausura 1 s. & pro altera 20 s. ad quatuor Anni terminos, and a Re-entry for Non-payment. Hill and his Wife died, their Son sold the Reversion of Broom-Acre, rendering Rent to Smith: The Rent of Broom-Acre is behind; Smith enters and leaseeth it to Reynolds, who being ejected, brings Ejectione firmæ, and Judgment was given for him; for that they are several Reservations, and several Conditions, and the Rent is originally several. There is no Doubt, when two Closes are demised, two several Rents may be reserved. So is the Case in Dyer 308, 309. 2 Rol. 90. has been cited too, which is only for the Words [equally to be divided]; so 2 Cro. 254. No doubt Tenants in Common may join in Avowry for Damage-feasant; and so in Trespass.

Chief Justice. Suppose the Words had been [equally to be divided] (viz.) 20 l. to one, &c. and there had been no Habendum, Would they not have been Tenants in Common? Certainly they had: Then where is the Difference? Here the 100 l. Annuity is granted to five equally, &c. The Habendum is, one 20 l. to one, and so on; and there is to be a Surdibor, but that is by a new Grant, and there is to be no Surdibor between the last two. As to the Case of Stukely and Butler, in Hob. 171, 172. where he puts a Difference where the Rents are reserved severally at the first, and where they are entire at the first; but that Case is not yet determined, my Lord Hobart only

Co. 54. 55.
Moore 199,
200, 201,
202.
3 Leon. 124,
125, 126,
127.
1 And. 173,
174, 175,
&c.

Vide 1 Lev.
109.
Ray 80.
1 Sid. 177.
1 Keb. 563,
572.

Tenants in
Common may
join in Avow-
ry for Da-
mage-feasant;
so in Tres-
pass.

11th 2d 1661
3d 1661
1st 1662
2d 1662

recten

reverted to the Crown. See. See in Moore 880. the Court was divided that as to the Words [Videlicet] Land granted to Cress, Wills, Gutterman, standing in the Name of the [Videlicet] within the Statute called A. B. and C. If the Videlicet were void or not? was the Question.

Grants several and not joint.

2 Lev. 27.

1 Vent. 167,

168.

1 Rol. Abr.

761.

2 Keb. 601,

803, 838,

842.

Carthew ad idem. The Intent of the Grantor was, That there should be several Rents to the five Grantees, and the Court will expound it accordingly. The Intent appears by the Grant in the Premises, the Habendum, and the Clause of Discreet, in all which, the Words severally and respectively are always used, which makes it the same as if they were applied to each Person and Grant distinctly; and this is proved by the Pleading of such Words in many Cases, of which I will cite two or three. 2 Saund. 115, 116. 11 H. 6. 11. b. Rast. 622. b. 625. a. Corydon and Hardy joined in Action against L. for grinding at their Mills; the Declaration was demurred to, because it appeared their Interests were several. Per Cur.: Though their Interests be several, yet the not grinding at any of their joint Mills, is an entire Damage to both of them.

And if these Words shall be taken so in Pleading, to signify that which otherwise would be joint, much more they shall in Grants; and if the Grantor had intended this for a joint Grant, the subsequent Clause of giving it by Discretion would be useless and void; and if it is an entire and joint Grant, then it must surmise in the Case of the last case, notwithstanding the Clause that it shall not; which is contrary to his express Meaning and Intent. There are some Cases that come up to this. Yelv. 23, 24. 3 Cro. 637, 651. Dyer 308, 309. 3 Cro. 340, 341. 17 All. Pl. 10. 1 Cro. 154. Bere against Woodley. Jones 207. is a strong Case for us; but they all over-rule this: For in those Cases, either in the Premises, Habendum, or Discreet, there is some Word absolutely joint; but here throughout the Deed the Words are several. As of Knight's Case, which was objected, there the Land was first charged with an entire Rent, and then the [Viz.] comes too late; but if the Words had been several at the first, the Reservation had been so too, and so it differs from Winter's Case, 14 Eliz. Dyer 308. and will not vitiate ours which does not come under a Videlicet; and the Case of 2 Rol. 90. is not to the Purpose.

Darnell, contra. This is a Joint-tenancy on the whole Deed. They have not answered the material Part of the Cases cited by us. 2 Rol. 90. Bird against Weekes. The Difference

... to be taken by the Court, and their names being
... and that had a ...
... and this is an a Debt. The Grant is
joint of one Rent of 100l. per Annum, and the Charge of De-
bts is, That if the 100l. be behind, and not if the several
Rents of 20l. is Arrear; so that this is also joint, which
shows his Intent.

Chief Justice. I don't know why a [videlicet] shall not make
a Description, as well as an Habendum; and this is also sepa-
rate in the Habendum, for it is to each of them and their Assigns
respectively, for the Lives of them and either of them respec-
tively. If you construe it to be a several Grant, all the Parts
of the Deed are satisfied, but not if it is to be taken joint; for
then a Payment to one would be a Payment to all, when the
Deed limits 20l. to each of them. And how can it be construed
according to the Intent, when each of them would not have a
Remedy for his 20l. without Partition?

Then the Distress is also several. The whole Annuity is
100l. in Gross, but it is distributed into 20l. each; and as to
the Merger on the Death of the three first, that amounts to
a new Grant, and it shall not surmise as to the two last: Now
if it be a several Rent, the Arrears shall not surmise, but go to
their Executors; the Will of the Deed cannot be satisfied
unless it be made a several Grant. Equally to be divided does
not make it several, but all the Clauses are several of them-
selves. You must agree, that if it had been said, Habendum
20l. to one, and so to the rest, that had been several, and that
is the same in Effect, though it says (Habendum) the 100l. to
them to be equally divided, (viz.) 20l. to one, which is the
same as if it had been the first Part to one, and so to the rest;
in which Case, one would not have showed for 20l. (as here
he must) but for the first Part.

Let me have a Copy of the Deed, for it is set forth in hac
verba; for if an Oyer of the Deed you have showed otherwise
than you ought, they may take Advantage of it though after
Oyer, as they may of any Thing that makes the Copy
erroneous, for we must judge on the whole Record. Adjourn.

The King and Hornby's Case.

A Petition to the Treasurer and Barons of the Exchequer
... by Joseph Hornby, Ten. Hill. i Gulielmi & Maria,
for the Allowance of Letters Patents granted by King Charles II.

(Via.) The
Operation of
it.

Vide Hob.
172, 276.
Moore 88a.
1 Salk, 294,
295.
1 Saund. 118,
169, 170,
286, 287.
2 Saund. 294,
291.

Equally to be
divided.

Vide ante 26.
1 Salk. 226,
390, 391,
392.

After Oyer, if
it appear the
Avowry is a-
bareable, tho'
after a Verdict.
Advantage
may be taken
of it.

Vide Shower's
M.S. Rep.

for Payment of an Underlet of the Excise, &c. by the Attorney-General versus generally. The Court gave Judgment for the Petitioner Hornby; whereupon the Attorney-General brought a Writ of Error.

Argued in the Exchequer-Chamber, where the Judgment was reversed.

Record. Petition. & Morac. superinde & Judicium, & Brevis de Error.

The Arguments of the Lord Chief Justice Treby for the Reversal, and the Lord Chief Justice Holt for the Affirmance.

Termiño Sancti Hillarii, Anno 1^o Gulielmi & Mariz, Regis & Regine.

London. Mid. Memorandum, Quod Josephus Hornby de Lond.

Gen. venit coram Baronibus de Scaccaria vicefina primo die Octobr. hoc Termiño in propria Persona sua & exhibuit Curie hic quosdam Literas Patentes Dom. Caroli Secundi nuper Regis Angliae &c. sub Magnis Sigillis Angliae concessis. gerens dat. tricesimo die Aprilis, Anno Regni illius Dom. Caroli nuper Regis Angliae vicefimo nono vid. Josepho Hornby, Hered. & Assignat. suis concessis. de annuatim redditus suo summa Mille ducent. quinquaginta & duas. Libr. Septemdecim. Solid. & decem Denar. annuatim solvendi recipiendi & percipiendi. [Anglice takes] per pradi. Josephum Hornby Hered. & Assignat. suis in perpetuum de redditibus reversionibus propriis & percipiendis. & emolument. & solutionibus reservat. surgent. crescent. & provenient. vid. nuper Dom. Regi Carolo Secundo Hered. & Successoribus suis de pro ex. suo ratione debiti Excise [Anglice Duty of Excise] super pennis Lupulæ. & Lupulæ. & alias Liquores infra Regn. Angliae. Domin. Wallie. & Vall. Barroli super Tardam, virtute Actus Parliamenti facti. Anno Regni ejusdem nuper Regis Caroli secundi duodecimo, Instaur. An Act for taking away the Court of Wards and Liveries and Tenures in Capite, and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in Lieu thereof; Dat. & concess. solenn. Quaterintus (viz.) ad Festum Annunciationis beate Marie Virginis, Nativitatis Sancti Johannis Baptistæ, Sancti Mich. Arch. & Nativitatis Dom. per aquas & aequales portiones sub fiduciam in iisdem Literis patentibus expressa. Et pradi. Josephus Hornby petit Literas patent. de recordo hic irrotulari. Quas quidam Literas patent. Remota hic receperunt & illas legi & sub serie prohibitionis iisdem Literis patent. content. irrotulari preceperunt. Et demum. nuper Literarum patent. sequitur in hac verba. (Scilicet.)

Charles the Second, By the Grace of God of England, Scotland, France and Ireland, King, Defender of the Faith, &c. To all to whom these Presents shall come, Greeting. Whereas, since the Time of Our happy Restoration, We have been involv'd in great and foreign Wars, as well for the Safety of our Government, as for the Vindication of the Rights and Privileges of Our Subjects; in the Prosecution whereof, We have been constrained for some Years past, contrary to Our Inclination, to postpone the Payment of the Monies due from Us to several Goldsmiths and others, upon Tallies stock, and Orders registred on, and payable out of several Branches of Our Revenue, and otherwise. And although the present Posture of Our Affairs cannot reasonably spare so great a Sum as must be applied to the Satisfaction of those Debts, yet considering the great Difficulties which very many of Our loving Subjects, who put their Monies into the Hands of those Goldsmiths and others, from whom We received it, do at present lie under, almost to their utter Ruin for Want of their said Monies; We have rather chose, out of Our Princely Care and Compassion towards Our People, to suffer in our own Affairs, than that Our loving Subjects should want so seasonable Relief; And having seriously considered of the Way and Means to effect this our present Purpose, We could not find any more Effectual and less Prejudicial to Us in the present Posture of our Revenue, than by granting to each of them the said Goldsmiths and others, to whom We are indebted as aforesaid respectively, and to his and their Heirs and Assigns, an Annual Sum or Payment, answerable in Value Yearly to the Interest of their respective Debts, at the Rate of Six Pounds per Cent. per Annum, for all such Monies that are due unto them. The Consideration whereof induced Us to command Our High Treasurer of England, to cause all the Accompts of the said Goldsmiths to be stated and made up by Richard Almon, Esq. one of our Auditors, to the first Day of January, 1676; which having been accordingly cast up and settled, it appears thereby that there is due and owing by Us unto our Trusty and well-beloved Subject, Joseph Poynt of London, Goldsmith, the Sum of Twenty-two thousand five hundred forty-eight Pounds five Shillings and six Pence. In Satisfaction whereof, according to Our Intent in these Presents expressed, we have resolved to grant unto him the Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence per Annum, out of that Part of Our Revenue of Excise which was granted to Us, Our Heirs and Successors for ever, by an Act of Parliament made in the Twelfth Year of Our Reign, intituled, An Act for taking away the Court of Wards and Liberties, and Tenures

in Capite, and by Statute made in that behalf, but notwithstanding, a Mortgage upon the said Lands, Tenements, and Hereditaments, and the Profits thereof, and the Receipts therefrom, That We, for the Consideration aforesaid, and in Satisfaction or Lien of the said Debt, on Sum of Twenty-two thousand five hundred forty-eight Pounds five Shillings and six Pence, by Us owing to the said Joseph Dony, and of Our especial Grace, certain Knowledge, and meer Mavour, have given and granted, and by these Presents, for Us, Our Heirs and Successors, do give and grant unto the said Joseph Dony, his Heirs and Assigns, the annual or yearly Rent or Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence, of lawful Money of England, to be yearly had, received and taken by the said Joseph Dony, his Heirs and Assigns for ever, out of the Rents, Revenues, Profits and Perquisites, Emoluments and Payments reserved, arising, accruing or coming, or that hereafter shall or may be reserved, arise, accrue or become due or payable to Us, our Heirs and Successors, out of, for or by Reason of the Duty of Excise upon Beer, Ale, and other Liquors, within our Kingdom of England, Dominion of Wales, and Town of Berwick upon Tyne, by Virtue of the said Act of Parliament, the said Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence per Annum, to be paid quarterly at the four most usual Feasts in the Year, that is to say, at the Feast of the Annunciation of the Blessed Virgin Mary, the Nativity of St. John the Baptist, St. Michael the Archangel, and the Birth of our Lord God, commonly called Christmas, by even and equal Portions, in Trust for such of the Creditors of the said Joseph Dony, as within one Year next ensuing the Date hereof shall, upon Notice of these Presents, deliver up their Securities, and accept of Assignments of proportionable Parts of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence, for Satisfaction of their respective Debts, according to the true Intent and Meaning of the Covenant in that behalf hereinafter contained, for so much as their proportionable Parts shall amount unto, and in the mean Time shall sue for or prosecute the said Joseph Dony, his Heirs, Executors or Administrators for such their Debts, and the Residue and Overplus of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence, to remain and be to and for the proper Use and Benefit of the said Joseph Dony, his Heirs and Assigns, without any Trust or Assignment whatsoever, the first Payment of the said Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and ten Pence, to commence from the Feast of the Birth of our Lord God, One thousand six hundred seventy and

It: And We do hereby, by Us, Our Heirs and Successors, under
 seal, direct and appoint Our High Treasurer, Chancellor, Under-
 Treasurer, Chamberlain and Barons of Our Exchequer, and the
 High Treasurer and Commissioners of the Treasury, Chancellor,
 Under Treasurer, Chamberlain and Barons of the Exchequer, of
 Us, Our Heirs and Successors that hereafter shall be, and all other
 Officers and Ministers of the said Court, and of the Receipt thereof,
 now being, or that hereafter shall be, that they and every of them,
 in their respective Places, do from Time to Time, upon Request
 of the said Joseph Dornby, his Heirs or Assigns, respectively per-
 form all Acts necessary for the constant and due Payment of the
 said yearly Rent or Sum of One thousand three hundred fifty-two
 Pounds seventeen Shillings and Ten-pence, to the said Joseph Dorn-
 by, his Heirs or Assigns, as the same shall grow due and become
 payable, and of every such Part and Parts as the said Joseph Dorn-
 by, his Heirs or Assigns shall grant or assign to any Person or Per-
 sons, from Time to Time, according to the Trust and Agreement in
 that Behalf herein contained; and as Occasion shall be, levy or
 strike, or cause to be levied or stricken in the Receipt of the Ex-
 chequer, of Us, Our Heirs and Successors from Time to Time,
 Tallies of Pro or Assignment, or other Tallies, as the Case may
 require, and as shall be desired, upon the Commissioners, Treasu-
 rers, Receivers, Collectors or Farmers of the said Duty and Reve-
 nue for the Time being; or upon such other Person or Persons as
 ought to be charged or chargeable therewith, or accountable to Us,
 our Heirs and Successors for the same, who are hereby required and
 directed from Time to Time to make due Payment thereof accord-
 ingly; so that the said Joseph Dornby, his Heirs and Assigns
 respectively, of all or any Part or Parts thereof, may certainly
 and duly, and on every of the said Quarterly Feast-Days afore-
 mentioned, for ever hereafter have and receive the said yearly
 Rent or Sum of One thousand three hundred fifty-two Pounds
 seventeen Shillings and Ten-pence, hereby granted out of Our
 said Revenue, without any further or other Warrant to be sued
 for, had or obtained from Us, Our Heirs and Successors in that
 Behalf, and without any Account, Imprest, or other Charge to be
 set upon the said Joseph Dornby, his Heirs or Assigns, or any of
 them, for the same: And if it shall happen at any Time hereafter,
 that the Rents, Issues or Profits of our said Revenue shall be paid
 into the Receipt of Our Exchequer, or elsewhere, to the Use of
 Us, Our Heirs or Successors, before the levying of such Tallies,
 or before Payment be made to the said Joseph Dornby, his Heirs
 or Assigns respectively, of the said yearly Rent or Sum of One
 thousand three hundred fifty-two Pounds seventeen Shillings and

every thing which shall be done in the only such year as shall be appointed by the said Management of our said Revenue, and shall be yearly paid unto us twelve thousand two hundred and twenty seven Shillings and Ten-pence Full-penny, or the like sum payable thereon unto our dear Son Charles the Queen's eldest Son and Heir; and the yearly Sum of twenty-four thousand Pounds payable to our dear Son Brother James Duke of York, which said several Sums, we will not in anywise direct, shall be paid and satisfied unto our said dear Son; and to our said son and our Heir, but of the said Revenue only, constantly and in the full Place before any of the said Payment, or any other Payment whatsoever to be made out of the same. And our Will and Pleasure is, that the said Joseph Durbey, for himself, his Heirs, Executors and Administrators, doth Covenant, grant and agree, to and with us, our Heirs and Successors, that he the said Joseph Durbey, his Heirs and Assigns, shall and will, at any Time or Times, within one Year next ensuing the Date hereof, grant and assign proportionable Part and Parts of the said yearly Rent or Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, unto such of his Creditors, or others, by their Appointment, as will be content to deliver up their Securities, and take such Assignments in Satisfaction of their Debts, according to the Trusts herein before expressed: And that he the said Joseph Durbey, his Heirs or Assigns, shall not nor will, during the said Space of one Year, make any Grant or Assignment of all, or any Part of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, unto any Person or Persons but such as are Creditors of the said Joseph Durbey, or others, by their Appointment as aforesaid: And that if any Difference shall at any Time or Times, within the Space of one Year and an Half now next coming, arise between the said Joseph Durbey, his Heirs, Executors, Administrators or Assigns, or any of them, and the said Creditors, or any of them, touching the assigning or disposing of all or any Part or Parts of the said Annuity or yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence; that then the said Joseph Durbey, his Heirs, Executors, Administrators or Assigns, shall and will from Time to Time submit themselves, and all Matters and Things relating thereto, to the Control of the Lord High Treasurer, or the Commissioners of the Treasury for the Time being, and shall and will observe and fulfil all such Orders and Directions as the Lord High Treasurer, or the Commissioners of the Treasury, shall from Time to Time make or give concerning the same: Provided always, and our further Will and Pleasure, Intent and Mean-

ing is, and is hereby declared to be, That all Assignments to be made as well before as after the said Space of one Year, of any Part or Parts of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence hereby granted, shall, within the Space of three Days next after the Execution thereof, be enrolled before the Auditor of the Receipts of the Exchequer, or the Clerk of the Petits for the Time being, to the End it may appear what Assignments have been granted, and Payments may be made thereupon according to the Rates of these Presents, and that every Assignment not so enrolled, shall be of none Effect. Provided also, That when We, our Heirs or Successors, shall at entire Payments have actually paid the full Sum of twenty-two thousand five hundred forty-eight Pounds five Shillings and Six-pence, of lawful Money of England, to the said Joseph Darnby, his Heirs and Assigns, and to such Person or Persons to whom such Assignment or Assignments shall be made as aforesaid, respectively, in Proportion amongst them, after the Rate of one hundred Pounds Principal Money, for each and every six Pounds per Ann. which they, every, or any of them respectively shall, or ought to have and enjoy of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, hereby granted by Virtue of these Presents, or such Assignment or Assignments as shall be made and enrolled as aforesaid, and so after those Payments and Rates for greater or lesser Sums, as the respective Cases shall happen, and also the Arrears of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, if any be: That then these Presents, and the Grant of the said yearly Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, shall cease and be void, any Thing herein before contained to the contrary notwithstanding. And we do hereby of our further special Grace, certain Knowledge, and mere Motion, for Us, our Heirs and Successors, grant unto the said Joseph Darnby, his Heirs and Assigns; and our express Pleasure is, That these our Letters Patents, and every Clause, Article, and Sentence therein contained, whereupon any Ambiguity or Doubt shall or may arise, that the same shall be at all Times expounded and taken most favourably and beneficially for the Advantage of the said Joseph Darnby, his Heirs and Assigns; and that these our Letters Patents shall be good and effectual in Law, and shall be available to the said Joseph Darnby, his Heirs and Assigns respectively, for his and their receiving and enjoying the said yearly Rent or Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, with all the Arrears thereof in Manner aforesaid, notwithstanding the not reciting, or not mentioning,

doing, or not truly and certainly reciting or mentioning of any
 of the said Statutes, Articles, or the said Grants, and given
 unto Us, Our Heirs and Successors, as if we had
 done, received or enjoyed the same: And notwithstanding the
 said reciting or not mentioning in this our Grant, any Lands or
 Estates, Grants, or Grants, Causes or Charges, made or to be made, or
 out of the said Revenue, or any Part thereof, due or to be due, or
 due, or to be due, and any other Part or Parts of the Revenue
 of Us, or generally on the Revenue, or the Debt or Debts
 of Us, or Grants, or of the Persons to whom the same are
 made, and notwithstanding that no Person be herein or there
 directed and certain yearly and other Rents and Profits of the Premises,
 or of the certain, true or due Nature of such Rents and Profits,
 or how or in what Manner they arise, become due or payable unto
 Us, our Heirs and Successors: And notwithstanding the not men-
 tioning how, and in what Manner the said Debt due from Us to
 the said Joseph Dumbie ariseth particularly, or any Mistake in the
 Statute, or in the Quantity or Sum of the aforementioned Debt
 due, or herein mentioned to be due by Us to the said Joseph
 Dumbie: And notwithstanding the Statute of Henry the Fourth,
 late King of England, published in the first Year of his Reign:
 And notwithstanding the Statute of Henry the Sixth, late King of
 England, made and published in the eighteenth Year of his
 Reign: And notwithstanding the Statute of Henry the Eighth, late
 King of England, made and published in the twenty-sixth Year
 of his Reign: And notwithstanding the Statutes or Acts of this
 present Parliament, made and published in the twelfth Year of
 Our Reign, whereby the said Revenue was, or was mentioned or
 intended to be granted, settled, and confirmed unto Us, Our
 Heirs and Successors, or any Article, Clause, Sentence, or Restraint
 therein contained: And notwithstanding any Defect in this our
 Grant, or any Act, Statute, Ordinance, Proclamation, Provision or
 Restraint whatsoever made or provided, or any other Act, Matter,
 or Thing whatsoever to the contrary hereof, in any wise notwith-
 standing. And lastly, Our Will and Pleasure is, and We do
 hereby of Our more abundant Grace, certain Knowledge, and
 free Motion, for Us, and Our Heirs and Successors, covenant
 and grant to and with the said Joseph Dumbie, his Heirs and As-
 signs, that due Payment shall be made of the said yearly Sum of
 One thousand three hundred fifty-two Pounds seventeen Shillings
 and ten Pence, hereby granted, and all other Things hereby di-
 rected to be done on Our Part, shall be from Time to Time done
 and performed, according to the true Intent and Meaning of these
 Presents: And that if at any Time hereafter, any Defect or Que-
 L tion

Shall be found or made of or in the Validity of this Our present Grant. That then upon the humble Petition of the said Joseph Hornby, his Heirs and Assigns, We, Our Heirs and Successors, will be graciously pleased to make such further Grant, Assurance and Confirmation of the said yearly Rent or Sum of One thousand three hundred fifty-two Pounds seventeen Shillings and Ten-pence, to the said Joseph Hornby, his Heirs or Assigns, as by Our Attorney General shall be approved of and advised, and by the Council learned in the Law, of the said Joseph Hornby, his Heirs or Assigns, shall be advised and desired, and with such beneficial Clauses therein to be contained as shall be thought expedient and most conducing to the Performance of Our Will and Pleasure herein before declared. In Witness whereof, &c.

Quibus quidem literis patentibus legitur prout Josephus Hornby dicit, quod Figeus Premissorum ipse idem Josephus Hornby scilicet fuit de & in prout annuatim Reddita sue Summa Mille trecenti quinquaginti & duarum Librarum septendecim Solidi & decem Denarij ut de Feodo & Juris & sic inde scilicet existit ipse idem Josephus Hornby possidet scilicet quante Die Augusti, Anno Regis Domini (nuper Regis) Caroli Secundi tricesimo tertio apud Westm' prout per quoddam Scriptum suum Sigillo suo sigillat' & in Cur' hic de Record' Debit' modo & Debit' Juris Formis brevitat' cujus dat' est eiusd' Die & Anno ult' mentionat' pro Considerat' in eodem Scripto mentionat' relaxavit prout Dom' Carolo Secundo, Hared' & Successoribus suis annuatim Sum' Sexcenti Librarum Parvolet' prout annuatim Sum' Mille trecenti quinquaginti duar' Librarum septendecim Solidi & decem Denarij prout Josepho ut prout Concess. prout per Record' Cur' il' liquet & apparet, & ipse idem Jo. Hornby continavit, & adhuc scilicet existit ut de Feodo & Juris de & in (quodam) Reddita sue Summa Septingenti quinquaginti duar' Librarum septendecim Solidi & decem Denarij resid. prout annuatim Reddita sue Summa Mille trecenti quinquaginti duar' Librarum septendecim Solidi & decem Denarij in Literis Patente' prout mentionat' & per eisd. vid. Josepho ut prout Concess. & eisd. annuatim Reddita sue Summa Septingenti quinquaginti & duar' Librarum septendecim Solidi & decem Denarij resid. prout annuatim Reddita sue Summa Mille trecenti quinquaginti duar' Librarum septendecim Solidi & decem Denarij de Juris hab' & recip' debuit & debet Figeus Literas Patente' prout. Et prout Josephus ult' dicit, quod ipse recepit & satisfactum fuit, & existit de & pro omnib' Arrear' prout annuatim Summa Septingenti quinquaginti & duar' Librarum septendecim Solidi & decem Denarij debuit & solabit' ad Festum & pro Festo Annue' beate Marie Virg', Anno Reg' Dom' (nuper Regis) Caroli 26i tricesimo quarto, & quod Summa Quingue mille octoginti & duar' Librarum quatuor Denarij & unius Oboli pro Arrearibus quid. annuatim Summa Septingenti quinquaginti & duar'

duar' Libr' septendecim Solid. & decem Denar' post grad. Festum An-
nunc' beate Marie Virg'. Anno tricesimo quinto supradicti. & solubil. ad Festum & pro Festo Natalis Domi. commutatur vna' Christ-
mas ult' preteritis Anno primo Regis' dissonum Domi Regis & Domi
Regine nunc modo debet' & insolubil. existit' preses Jo. Horaby, scil'
Sum' Cent' octoginta & octo Libr' quatuor Solidi quinque Denar' &
unius Oboli, pro uno Quarterio Anno finit' ad Festum Natalis Sancti
Johannis Baptista Anno Regni dicti. (nuper Regis) Caroli ad tricesimo quinto, & simul Sum' Centum octoginta & octo Libr' quatuor
Solidorum quinque Denar' & unius Oboli, pro uno alio Quarterio Anno
finit' ad Festum Sancti Mich. Archangeli Anno tricesimo quinto supra-
dicti & simul Sum' Centum octoginta & octo Libr' quatuor Solidi quin-
que Denar' & unius Oboli, pro alio Quarterio Anno finit' ad Festum
Nat' Domi Anno tricesimo quinto supradicti & simul Sum' Centum
octoginta & octo Libr' quatuor Solidi quinque Denar' & unius Oboli,
pro uno Quarterio Anno finit' ad Festum Annunc' beate Marie Virg' An-
no Regni dicti (nuper Regis) Caroli ad tricesimo sexto, & simul Sum'
Cent' octoginta & octo Libr' quatuor Solidi quinque Denar' & unius
Oboli, pro uno alio Quarterio Anno finit' ad Festum Nat' S. Johannis
Bapt' Anno tricesimo sexto supradicti & simul Sum' Centum octoginta
& octo Libr' quatuor Solidi quinque Denar' & unius Oboli, pro uno
alio Quarterio Anno finit' ad Festum S. Mich. Arch' Anno tricesimo
sexto supradicti & simul Sum' Centum octoginta & octo Libr' quatuor
Solidi quinque Denar' & unius Oboli, pro uno alio Quarterio Anno fi-
nit' ad Festum Nat' Domi Anno tricesimo sexto supradicti & simul Sum'
Centum octoginta & octo Libr' quatuor Solidi quinque Denar' & unius
Oboli, pro uno alio Quarterio Anno finit' ad Festum Annunc' beate Ma-
rie Virg. Anno primo (nuper Regis) Jacobi ad, & simul Sum' Centum
octoginta & octo Libr' quatuor Solidi quinque Denar' & unius Oboli,
pro uno alio Quarterio Anno finit' ad Festum Nat' S. Joh' Bapt' Anno
primo supradicti & simul Sum' Centum octoginta & octo Libr' quatuor
Solidi quinque Denar' & unius Oboli, pro uno alio Quarterio Anno
finit' ad Festum S. Mich. Arch' Anno primo supradicti & simul Sum'
Centum octoginta & octo Libr' quatuor Solidi quinque Denar' &
unius Oboli, pro uno alio Quarterio Anno finit' ad Festum Nat' Domi
Anno primo supradicti & simul Sum' Centum octoginta & octo Libr'
quatuor Solidi quinque Denar' & unius Oboli, pro uno alio Quarterio
Anni finit' ad Festum Annunc' beate Marie Virg' Anno 2do Regni
eiusdem nuper Jacobi ad Regis, & simul Sum' Cent' octoginta & octo
Libr' quatuor Solidi quinque Denar' & unius Oboli, pro uno alio Quar-
terio Anno finit' ad Festum Nat' S. Joh. Bapt' Anno 2do supradicti &
simil. Sum' Centum octoginta & octo Libr' quatuor solidi quinque
Denar' & unius Oboli, pro uno alio Quarterio Anno finit' ad Festum
Sancti Michaelis Archangeli Anno 2do supradicti & simul Sum' Cen-
tum

item octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro alio Quarterio Anni finit' ad Festum Nat' Dom' Anno 2do supradicto, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Annunc' beate Marie Virg' Anno tertio Regni ejusd' (super Regis) Jacobi 2di & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' S. Joh. Bapt' Anno tertio supradicti & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum S. Mich. Arch' Anno tertio supradicti, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' Dom' Anno tertio supradicti, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Annunc' beate Marie Virg' Anno quarto Regni pradi. (super Regis) Jac. 2di, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' S. Joh. Bapt' Anno quarto supradicto, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum S. Mich. Arch' Anno quarto supradicto, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' Dom' Anno Dom' Millesimo sexcentesimo octogesimo octavo, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Annunc' beate Marie Virg' Anno Regni pradi. Gulielmi & Marie (nunc Regis & Regine) primo, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' S. Joh. Bapt' Anno primo supradicti, & simil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum S. Mich. Arch' Anno primo supradicti, necnon alia Consimil. Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, pro uno alio Quarterio Anni finit' ad Festum Nat' Dom' munc ult' praterit' & primo supradicti, attingen' in toto ut supra. Et petit idem Jos. Hornby, quod pradi. Breve Paten. in Fornis pradi. Rati. juxta Tenor' & Effect' eorund. prefat' Jos. Hornby allocetur, & quod pradi. sept' alia quarteriales Sum' Centum octoginta & octo Libr' quatuor Solid. quinque Denar' & unius Oboli, a Festo Annunc' beate Marie Virg' Anno Regni dicti (super Regis) Jacobi 2di tricesimo quinto usque ad Festum & pro Festo Nat' Dom' munc ult' praterit' attingen' ut supra, ad quinque mille octoginta & duos Libr' quatuor Denar' & unius Obolum, sicut prefertur Debit' & Arretu, & insolu' existen' prefat'

præfat' Josepho Hornby solvantur, quodque etiam præd' annual' reddit' sue sum' septingent' quinquaginta & duarum libr' septendecim solid' & decem denar' resid' præd' annual' reddit' sue sum' mille trecent' quinquaginta & duarum libr' septendecim solid' & decem denar' in literis patentibus præd' mentionat' a præd' festo Natalis Domini ult' præterit' præfat' Josepho Hornby, bare'd & assign' suis, ad præd' separalia festa in dictis literis patentibus specificat' in posterum per aquas & aequales portiones secund' formam & effectum literarum patentium præd' solvantur, quodq; talis toties quoties casus requireret, levand' ad recept' hujus Scaccarij pro dicto annuali redditu sue sum' septingent' quinquaginta & duarum libr' septendecim solid' & decem denar' resid' præd' sum' mille trecent' quinquaginta & duarum libr' septendecim solid' & decem denar' quando & quoties idem resid' reddit' sue sum' seu aliqua pars vel parcel' inde deveniret, debet' levarentur secundum formam, effectum & directionem earundem literarum patentium, & secundum cursum recept' hujus Scaccarij, & quod omnes potest' remedia & res quacunque in & per dict' liter' patent' concess' & mentionat' tangen' solution' denar' sum' in dictis literis patent' mentionat' & pro beneficio præfat' Josephi Hornby, bare'd & assign' suorum exequerentur & capiant effectum secund' formam & effectum liter' patent' præd' cum hoc quod idem Josephus Hornby verificare vult, qd' ad præd' festum Natalis Domini ult' præterit' sufficien' fuer' & ad hoc sufficien' existunt de reddit' revencon' proficui, perquisition. [Anglice Perquisites] emolum' & solut' renovan' provenien' recept' & solut' de & pro debito de le excise præd' virtute actus parliamenti præd' ad solvend' & satisfaciend' præfat' Josepho Hornby, præd' summam septingent' quinquaginta & duarum libr' septendecim solid' & decem denar' sicut præfertur ei debet' & a retro existen' ultra & præter omnes annual' sum' necessar' & solubil' usq; tempus illud pro gubernation' [Anglice Management] dict' revencon' & ultra & præter præd' sum' duodecim millo ducent' & novem libr' quindecim solid' quatuor denar' & unius oboli, aut eo circiter; solubil' exinde Catharinæ Regine, tunc consort' nunc regina dotal' dicti Dom' (nuper Regis) Caroli secundi, ut parcel' junctura sue, in literis patentibus præd' mentionat' & ultra & præter præd' sum' viginti & quatuor mille libr' solubil' præd' Jacobo, tunc Duci Eborac' Fratri Domini (nuper Reg') Caroli secundi, in literis patent' præd' concess' cum hoc etiam qd' præd' Josephus Hornby verificare vult, quod nec præd' dominus Carolus secund', nuper Rex Angliæ, &c. nec præd' Dominus Jacobus secundus, nuper Rex Angliæ, nec præd' Dom' Willielmus & Maria, modo Rex & Regina Angliæ, aut eorum aliqui vel aliquis bucusque non solverit seu solvit præfat' Josepho Hornby aut assignat' suis præd' sum' viginti duar' mille quingent' quadraginta & octo libr' quinq; solid' & sex denar' in dictis literis patent' mention' seu aliquam inde partem seu parcel' ultra seu præter sum' decem mille libr' existen' consuet' in dict' script' relaxat' per præfat' Jos.

Hornby prefat' Carolo Secundo, nuper Regi Anglie, die et prefat' no fact' & pro quo sunt ipse idem Josephus Hornby solentem eidem Domino nuper Regi prefat' annuat' sum' foverent libe' p'ced' annuat' sum' mille trecent' quinquaginta et octiduum libe' foverentem solus & decem denar' superius mentionat.

Co this the Attorney General returns generally, and the said Joseph Hornby the Petitioner joined in Demurrer.

And the Court gave Judgment for the Petitioner Joseph Hornby; whereupon the Attorney General brought a Writ of Error in the Exchequer-Chamber. And the Judgment is reversed in the Court of Error; which is as follows:

DOM' Rex & Dom' Regina nunc Gulielmus & Maria mandaverunt Theaur' & Baronibus de Scaccar' suo breve suum clausum in hæc verba, scilicet, Gulielmus & Maria Dei Gratia Anglie, Scotie, Francie & Hibernie, Rex & Regina, Fidei Defensores, &c. Theaurario & Baronibus suis de Scaccar' suo salutem: Quia in Record' & Process. ac etiam in redditione iudicii loquitur ejusdam petitionis ejusdem Josephi Hornby, quæ fuit in curia nostra coram vobis prefat' Baronibus nostris de Scaccar' nostro prefat' termino Sancti Hillarii, Anno Regni nostri primo, exhibi' de allocatione quorundam literarum patenti' dom' nuper Regis Caroli secundi prefat' Josepho Hornby & heredibus suis concess' & solutio' ejusdem annual' reddit' per easd' literas patenti' per eundem nuper Regem eidem Josepho Hornby, & heredibus suis concess' solvend' & percipiend' de revention' proficulis & solutio' surgen' & provenien' nobis, hæred' & success' de pro & ratione debiti' Ractise, sup' potum lupulæ & illupulæ & alios liquores hacten' arretras' ejusdem annual' reddit' pro separat' quarter' Anni finit' ad festum Nativitat' Domini anno primo supradict' error intervenit manifestus ad grave damnum nostrum. Ac cum in statuto in Parlamento Dom' Edward' nuper Regis Anglie tertii progenitoris nostri apud Westm' Anno Regni sui tricesimo primo, tenet' edit' inter ceterum concordat' fuit & stabilit' quod in omnibus casibus regem aut alias personas tungen' ubi quis queritur de errore facto in Scaccar' Cancellar' Theaur' venire fac' eorum eis in aliquam Cameram consilii juxta Scac' record' & process. hujusmodi extra dict' Scaccar' & assumptis sibi iusticiariis & aliis peritis talibus qualem sibi videbit' fore allumen' vocari fac' eorum eis Baron' de Scaccar' prefat' ad audiend' information' facta & causas iudiciorum suorum & super hoc negotium hujusmodi debet' fac' examinari. Et si quis error invent' fuit illum corrigi & rectos emendari ac postea eos in dict' Scaccar' ad executionem inde faciend'

faciend' roriet' fac' sicut pertinet prout in eod' statuto plenius con-
tinetur. Nos igitur volentes emovere si quis fuerit iuxta forma stat
prad' coram & ceteros iudicium fieri in hac parte vobis mandamus
quod si iudicium inde reddiderit in tunc record' & process' prad'
cum omnibus integris coram Dom' Commissionariis ad custod' si-
gillum magnum Anglie & vobis vos prefat' Thesaur' in cameram
consilia juxta Secretarium prad' [vocat le Chancery Chamber] die
Martis videlicet nona die instantis mensis Februarii venire fac'. Ut
quod Dom' Commissionarii & vos prefat' Thesaur' visis & examinatis
record' & process' prad' auditisq; informationibus vestris vos prefat'
Barones ulterius in hac parte de consilio iusticium & aliorum perior
huiusmodi fieri fac' quod de jure & secundum formam stat. prad' fu-
erit faciend'. T. nomen ipsa apud Westm' primo die Februarii. Anno
Regni W. 3. Fish' Alloc' R. Atkins.

Record' & process' de quibus in brevi de errore pradict' fit men-
tio sequitur, &c.

Et super hoc Georgius Treby, Miles, Attorn' dictor' Dom' Regia
& Dom' Regina, nunc general' qui pro eisdem Dom' Rege & Dom'
Regina in hac parte sequitur, pralen' hio in curia in propria persona
sua pro eisdem Dom' Rege & Dom' Regina dicit quod in record' &
in process' prad' necnon in redditione iudicii prad' de & super
prad' Morie in Lege manifesta est errat'. In hoc, videlicet, quod
prad' Litere Patent' superius recitat' & materia in eisdem content'
& specificat' ac prad' materia per dict' Josephum Hornby, in forma
prad' allegat' minus sufficien' in lege existunt ad ipsos Dom' Regem
& Dom' Reginam nunc de aut cum solution' denar' pradict' de ar-
rearag' pro prad' separabilibus quarteriis Anni aut cum prad' solu-
tion' prad' annual' reddit' sive sum' prefat' Josepho Hornby in for-
ma prad' onerand'. Eo tamen non obstante adjudicat' existit per Ba-
rones prad' quod prad' litere patent' prefat' Dom' nuper Regis Ca-
roli Secundi prefat' Josepho Hornby, ut prefertur concessit, & supe-
rius recitat' & irrotulat' juxta tenorem & effectum earundem ipsi
prefat' Josepho Hornby allocat'. Et quod prad' summa quinque
mille octogint' & duarum librarum quatuor denar' & un' obol'
pro arretragis dict' annual' reddit' sive sum' septingent' quinquag-
int' duarum librarum septendecim solid' & decem denar' resid'
prad' annual' reddit' sive sum' mille trescentar' quinquagint' duar'
librar' decem solidor' & decem denar' in literis patent' prad'
mentionat' a prad' Festo Annunciationis beate Marie prad' Virginis
Anno Regni dict' Dom' nuper Regis Caroli Secundi tricesimo quar-
to usque ad Festum & pro Festo Natalis Dom' Anno primo Regni
Dom' Gulielmi & Dom' Marie nunc Regis & Regina supradict'
sic ut prefertur arrot' & insolut' existen' ipsi prefat' Josepho Hornby
ad recept' hujus Scaecar' per man' Commissionar' Thesaur' & Camerar'
ejusdem

ejusdem recept. qui modo sunt & per man. Commissionar. Theaur. & Camerar. ejusdem recept. pro & tempore existen. de thesauro provenien. accrescen. ex illa parte revention. de le Excise in Literis Patent. præd. mentionat. fore concess. dicto nuper Regi Carolo Secundo, hered. & success. suis imperpetuum per actum Parliament. fact. Anno Regni ejusdem nuper Regis duodecimo in man. eorund. Commissionar. Theol. & Camerar. jam exist. in manus Commissionar. Theol. Theaur. & Camerar. impolterum existen. solvetur post & ultra annual. sum. necessar. solubil. pro gubernation. [Anglice Management] dict. revention. de le Excise, & post & ultra annual. sum. attingen. ad duodecim mille ducent. & novem libras quindecim solid. & unum obol. seu eo circiter in Literis Patent. prædict. mentionat. fore solubil. exinde annuatim Catharine nuper Regine Consort. dicti nuper Regis Caroli Secundi & modo Dom. Regine dotissæ Angliæ & parcel. juncturae suæ, & post & ultra præd. summam vigint. & quatuor mille librarum in Literis Patent. præd. mentionat. fore solubil. Jacobo tunc Duci Ebor. fratri dict. Dom. nuper Regis Caroli Secundi & quod præd. annual. reddit. five summa septingent. quinquagint. & duarum librarum septendecim solid. & decem denar. resid. præd. annual. reddit. seu sum. mille trescentar. quinquagint. & duarum librarum septendecim solid. & decem denar. in præd. Literis Patent. mentionat. eidem Josepho Hornby sic ut præfertur concess. a præd. festo Natalis Dom. Anno Regni dict. Dom. Gulielmi & Dom. Mariæ nunc Regis & Regine Angliæ, &c. primo supradict. ipsi eidem Josepho Hornby, hered. & assign. suis ad recept. hujus Scaccar. per manus Commissionar. Theol. Theaur. & Camerar. ejusdem recept. pro tempore existen. de Thesauro de tempore in tempus provenien. accrescen. & emergen. de præd. hæreditar. revention. de le Excise in man. suis de tempore in tempus existen. post & ultra annual. summam necessar. solubil. pro gubernation. [Anglice Management] dict. revention. de le Excise, & post & ultra annual. summam attingen. ad duodecim mille ducent. & novem libras quindecim solid. quatuor denar. & unum obol. aut eo circiter in dictis Literis Patent. mentionat. fore solubil. exinde annuat. præfat. Catharinæ modo Regine dotissæ Angliæ ut parcel. juncturæ suæ & post & ultra annual. summam viginti quatuor mille librarum in eisdem Literis Patent. mentionat. fore annuat. nuper solubil. præfato Jacobo Duci Ebor. & modo annuat. solubil. Dom. Regi & Dom. Regine nunc ad præd. sepeal. festa Annunciationis beatæ Mariæ Virginis, Nativitatis Sancti Johannis Baptista, Sancti Michaelis Archang. & Nativitat. Dom. Dei nostri communiter [vocat. Christmas] per æquas & æquales portiones annuatim solvetur. Et quod tall. toties quoties casus requireret levand. ad dict. recept. scaccar. pro præd. annual. redditu five sum. septingent. quin.

quingenta & duarum librarum septendecim solid' & decem denar' resid' præd' annalis redditus mille trecentarum quinquagint' duarum librarum septendecim solid' & decem denar' idem resid' redditus seu aliqua inde parcel' deveniret debit' secundum formam & effectum Literarum patent' præd' super Commissionarium Thesaurarium, Receptor' Collector' sive firmarium dict' Hereditarium Revention' de le Exche per Officiar' recept' hujus Scaccar' pro tempore existent' ad quos Levac' Tallior' in eod' recept' pertinet seu pertinebit de tempore in tempus ad requisition' ejusdem Josephi Hornby, Hæred' & Assign' suorum levetur secundum formam, effectum & directionem Literar' patent' prædict' & secundum cursum dict' recept' Scaccar' salvo semper jure Regis & Regine nunc si, &c. Ideo in eo manifeste est erratum; Errat' est etiam in hoc quod per Record' præd' apparet quod judicium præd' in forma præd' reddit' existit pro præfat' Josepho Hornby versus eisdem Dom. Regem & Dom. Reginam ubi per Legem terre hujus Regni Angliæ judicium ill' reddi debuisset pro eisdem Dom. Rege & Dom. Regina nunc versus præfat' Josephum Hornby. Ideo in eo manifeste est erratum, & sic idem Attornat' General' pro eod' Dom. Rege & Dom. Regina dicit quod in Record' & process. præd' ac in Recordo judicii præd' manifeste est errat' & super inde idem Attornat' dictor' Dom. Regis & Dom. Regine pro eisdem Dom. Rege & Dom. Regina petit quod judicium illud ob errores præd' & alios in Record' & process. existent' revocetur annulletur & penitus pro nullo habeatur. Ac etiam breve dictor' Dom. Regis & Regine & præmunniend' præfat' Josephum Hornby, essend' coram præfat' Dom. Custod' Magni Sigill' Angl' & Domino Thesaurario ad certum diem auditur. Record' ac Process. præd' errores, & ulterius ad faciend' & recipiend' quod fuit iustum in Præmissis, &c. Et ei conceditur, &c.

Super quo idem Joseph' Hornby dicit quod nec in Record' & Process. præd' neq; in redditione Judicii præd' de & super præd' Morac' in Lege in ullo est erratum. Et petit quod curia dict' Dom. Regis & Dom. Regine nunc hic procedat tam ad examinationem Record' & Process. præd' quam Materie præd' superius pro erroribus assignat' sed quia Curia vult advisari in Præmissis antequam, &c. Ideo dies dat' est partibus præd' in statu quo sicut nunc a die Pasch' usq; in unum Mensem proximum Anno quarto Regni Dom. Gulielmi & Dom. Mariæ nunc Regis & Regine de judicio suo inde audiend' eo quod Curia dict' Dom. Regis & Dom. Regine nunc inde nondum, &c. Ad quem diem vener' partes præd' & ob causam præd' habend' diem ulterior' in statu quo nunc usq; in Octab' Sanct' Trin' ad Judicium supm inde audiend' eo quod Curia hic inde nondum, &c.

The Arguments of the Lord Chief Justice Treby.

THERE are two points in this Case :

1. Whether these Letters Patents are valid in Law, and sufficient to bind the King?

2. Whether that the Remedy that these Petitioners have taken be proper?

As to the first, I am of Opinion, that the Letters Patents are valid and sufficient to bind the King.

It is objected, That the Words [Successors] in the Statute by which this Revenue is given, intends that it shall be kept in the Crown, and unalienable. To this I answer, That there are several other Statutes by which Lands and other Revenues were given to the King by the same Statute that are in this Statute; and yet the Kings of England had always Power to alien them, as appears in *Beake's Case* in *Flowd.* and by the Statute of Mortmain, *Yagh. 62. 1 Rot. Abr. 198. &c.* So King Charles II. having an Estate of Inheritance in this Branch of his Revenue, had the same Power to alien this as he had to alien any other Part of it.

It has been strongly objected, That if the King should have a Power to alien all his Lands and Revenues, it might be of pernicious Consequence to his Subjects; and that then our Exchequer in England should be like the Spanish Exchequer, of which it is said, that it receives Taxes and Revenues from the general, only to pay them out to some particular Persons.

To this I answer, That this might be some Reason to induce the making an Act of Parliament to restrain the King's Power of Alienation; but since here the Parliament has thought fit to give the King such a Power, we ought to acquiesce and submit to it.

But what I shall chiefly pressed on, is the Intendment, which I think to be very extraordinary, and such as the Barons would not give; so I do not think that they can warrant the King's Transferring out of the Exchequer. When I take this Intendment to be very atrocious and detestable in several Particulars;

If the Barons can award the King's Treasury out of the Exchequer.

1. The Petition for the Exchequer, who is the Chief Officer
therein, in bringing the Money.

2. The Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

Plowd. 378,
381, 477, 458.

3. The Judgment of the Court, who is the Chief Officer,
in the Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

4. The Judgment of the Court, who is the Chief Officer,
in the Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

Pop. 203, 211,
Noy. 89,
Lat. 276,
177, 188,
Vide 8 Rol.
Ab. 771, 774,
1 Rol. R. 278,
Yelv. 130,
2 Cro. 385,
632,
Hob. 194,
3 Cro. 442.

5. The Judgment of the Court, who is the Chief Officer,
in the Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

6. The Judgment of the Court, who is the Chief Officer,
in the Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

7. The Judgment of the Court, who is the Chief Officer,
in the Exchequer, who is the Chief Officer, who is the
Receiver of the Money, and who is the Treasurer of the
Exchequer, in Plowd. 378. and also in Goddard's
Records.

So that I take it, that the Treasurer may, if he pleases, pay these Annuities to the Petitioners; But whether he will do it or no, is left to his Conscience and Discretion; but he can not be compelled to it but by Authority of Parliament.

Then this Writ is not warranted by the Court of the Exchequer; for there were not such Writs there; I never it would be the Law of the Land, and so in Rawlin's Case, 4 Rep. and Plow. 32. but there has been no such Usage there; and in this Point I agree with my Brother Lechmere, who perhaps has the greatest Experience in the Court of Exchequer of any Judge that ever sat there; for I think I lately heard him say, it was fifty Years since he practised there.

Vide ante
13, 14.

I have Reason to think, whatever Mr. Plowden says, that these Liberate's were granted upon Petitions to the King himself, and not to the Barons; you may see Abundance of them in Ryley's Placita Parliamentaria. It appears indeed in Brooke, tit. Talley de Exchequer T. ver. Ch. 136. that upon Delivery of this Writ to the Officer and Clerk in the Exchequer, an Action lay against the Officer for Non-Payment, but that ever it could be brought against the Treasurer, or Chamberlain, was never heard of.

But say they, there is a Clause in the Patent which empowers the Treasurer, &c. to make Payments, &c. and this they call a perpetual Warrant.

But this makes against the Petitioners; for if it is so, why do they make a Petition to the Barons of the Exchequer? if they can have their Debt without a Petition herein upon this Patent, where there is a Grant, a Command, and Warrant to the Treasurer and Officers to pay the Money, (which, say they, amounts to a Liberate) then it's a vain Thing to sue in the Exchequer for a Judgment; for it cannot be presumed, that a Liberate under the Seal of the Exchequer, Telle Chief Baron, should be of more Force than a Liberate under the Seal of England, Telle meyns, Reg. 191.

To clear this Point, it's necessary to enquire into the Power of the Court of Exchequer.

The Power of
the Court of
Exchequer
over the King's
Treasury.

I do agree that they are Supreme Subjuncts, and have Authority over the King's Treasure; but it is in transitu, as upon the Accounts Accounts, or any other of the King's Officers concerning the bringing in of the King's Revenues into the Exchequer; but when the Money is there, it is in its Centre, and the Barons have nothing to do with it, they are only Consultants, but not Parties. 3 Inst. 181. 4 Inst. 115. and it would be of dangerous Consequence for so many to have to do with the

the Treasury, lest (as Vernon says in his Book) there be too much Power in the Exchequer. I confess, the Court of Exchequer does use to enrol Charters in the Exchequer, and that is the Foundation of the Acquests, &c. and so is Ploy. But whether the Barons of the Exchequer have a Power to control and command the Treasurer, is a great and arduous Point, it is in effect, whether the Barons shall have the Power to turn out the Treasurer when they please, and whether the Petitions that were formerly preferred to the King, shall be now exhibited to the Barons of the Exchequer? Which matters I must own I cannot be brought to imagine, though I would think as favourably as possible in this Case, for I give this Opinion, not because I would, but because I must.

But I take this Power in the Barons, to be against the Nature and Institution of the Court of Exchequer, for they are originally empowered by the King to get in his Revenue, and it is for the Sake of the Revenue that they have any Thing else to do; and all they do, is to convey the King's Treasure to its proper Place, but they cannot dispose of it, for there is no Correspondence between the Barons and the Officers of the Treasury.

Upon Reversal of Attainders, we know there is no Restitution of the Money paid to the King, and the Reason is, because the Barons cannot in such Case control the Treasury. I remember several Years since, there was a Solicitor who brought the Rolls of a forfeited Estate in Dispute into Court; and they ordered the Money to be put into the Hands of the Remembrancer, for they said, If it was once paid into the Treasury, there was no getting it out again.

The Case in Point is no more than this:

Suppose the King be indebted to the Petitioners, and also to the Army, the Fleet, &c. Now who shall meet the Payment of these Debts, the Barons, or the Treasurer, who is the best Judge of the State of the Kingdom, and of its Necessities? So that suppose there was only 4000*l*. in the Exchequer, and we were threatened with a foreign Invasion, how shall this Money be disposed? Says the Treasurer, To raise Men, to pay the Army and our Fleet, that by their Assistance we may prevent the Enemy from coming amongst us. So, say the Barons, we must pay the Bankers with this Money, though at the same Time we open the Gates and let in Hannibal to our utter Ruin and Destruction. By Lord Coke in his *4th* Inst. creating of the Court of the Exchequer, takes Notice of the Oaths taken

On Reversal
of Attain-
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stitution of
Money paid
to the King.

The Treasurer
of the Exchequer, his
Oath.

The Nature
of his Office.
Vide Moore
475.
11 Co. 90,
92.

by the Treasurer, and also by the Barons. In the Treasurer's Oath it is mentioned, That he is to keep and dispend the King's Treasure faithfully; but in the Barons' Oath, there is no mention of this matter taken Notice of. Which to me is an Argument, that the Treasurer is Judge in Point of issuing Money, whether it be lawfully payable, or not, and to whom, in what Manner, and when it shall be paid, &c. And this I take to be the true Reason, why an Action can be brought against the Treasurer, because he acts as a Judge, and not as a Minister of the Court, for he is not Attendant to it as Sheriff, Bailiff, &c. nor, so I take it, may he pay, in answer for the Barons to say; but must be paid, in only for the Treasurer to say. Cro. Eliz. 343. Doddington's Case.

Then it is Reason to counterfeet the Great or Wythe Seal, because they only have to do with the King's Revenue; but it was never thought Reason to counterfeet the Exchequer Seal, which has nothing to do with it. Rls. Com. 22.

In the Complaints heretofore between the King and People, what has moved them they complained that the King's Treasures was mispent and misemployed; not that it was paid away without Letters Patents, or taken away without the King's Consent; but it was this, They blamed the Treasurer, because he paid away the King's Treasures to Persons unworthy, to Whores and Drunkensters, though they had Grants from the Crown by Letters Patents: But yet it was left to the Treasurer's Discretion to have paid them or not, which he should not have done, when perhaps the Publick Good required it.

Now I come to the Authorities in my Books. I shall begin with 2 Ed. 3. 25. & 28 Ass. pl. 20. wherein it is said by the Chief Justice, That he shall keep the Counters of all Masters that may have the King's Treasures, but not so as to remove the Disposal of the Treasures. Vid. 19 H. 6. 62, 63. and 2 Roll. Rep. 200. and 210.

So in Doddington's Mortgage Case, Rls. 200. it is said, That no Pious shall be paid in the Exchequer, but for the Advantage of Majesty of the King's Debt, and bringing in his Revenue; so that the Common Pleas in the Exchequer, are only bounden on giving in of the King's Revenue. I think to this Mr. Pymond, argued his Book is a mighty relief on by the other Side, from the Case of David and Abigail.

I believe it was the Substance of that Case that raised all this Dust, but I shall answer them by and by, and as yet I shall only observe, That there is not one Law that gives

place that takes the Credit to himself, I mean as to this Power of Detention by Detention in the Barons, &c. in the Case of Devonshire's Case, 11 Rep. 91. There is no Mention of Nevill's or Wroth's Case, though there was Opportunity enough to have mentioned them, if they thought they had been of any Weight and Authority. 130 a Rol. Abr. 180, and 180, and 183. the Resolution in the Case of Devonshire's Case is cited, but not a Copy of Nevill's or Wroth's.

In the next Place, I shall mention some Treatises concerning the Court of Exchequer.

1. *De Officiis et Potestate*
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100. *De Officiis et Potestate*

1. There is Gervasius Tilburtiensis de Rebus in Scotario gestis; who sets forth the Jurisdiction of the Court of Exchequer, but mentions nothing of this Power in the Barons to control the Treasury; the Capitalis Justiciarius Anglie had indeed a Control over the Treasures himself, as appears from Spelm. Gloss. 71, 931. So when Hugo de Burgo, who was the last Great Justiciary, was in Disgrace, he was charged to render an Account of the Expending of the King's Revenues; which shews that he had a Power over the Treasurer. But ever since this great Office has been discontinued, the Treasurer has acted according to his own Discretion.

The next Book that I shall quote, is called the Diversity of Courts; it is mentioned in my Lord Coke's Preface to the 10th Reports: But there is nothing of this Power in the Barons mentioned there, neither is it taken Notice of in the Mirror of Justice, cap. 12. Sect. 14. 4 Inst. 110. Fleta lib. 2. c. 59. Britt. 2. 6. Crompt. Jurisdiction of Courts, 105. This Book was printed fifteen Years after Mr. Plowden's, not in 4 Inst. 931. nor in 4 Inst. where the said Jurisdiction of the Court is fully set forth. But I can see no other Notice of this Power, in a Book which he printed on Purpose to answer to my Lord Coke, 4 Inst. 100. nor take Notice of any such Power. I shall not here attempt to mention Venour's Constitution of the Court of Exchequer, and the Cambden, and Sir Tho. Smith, who were good and learned Men, though their Books, I confess, are not of Authority: But if there had been any such Power in the Barons of the Exchequer, it is probable they would have taken Notice of it.

Next, there are Savil's Reports, Lamb's, and my Brother Hardens's Reports, which were chiefly of the Court of Exchequer, but yet they give not the least Countenance to any such Power: So in 1 Rol. Abr. 92, 93. in Lamb's Case, 3 Rep. 2 Rol. Rep. 294. there is not one Word of it.

I shall

I shall conclude this Point with this Observation: That since there were two great Powers in the Barons, (as is perceived) one of bringing in Money into the Exchequer, and the other of paying it out, that yet these Barons should be all Manners as to the greatest Power of paying it out, is very strange and unaccountable: Which indeed does induce me to believe, that there is no such Power in the Barons, and that those Petitioners have mentioned in their Petition the only Way of having their Annuities, that is, as their former Payments were made (viz.) by Warrant from the Lord Treasurer.

Now I come to the Objections.

1. They quote Ryley's pla. Parl. pla. 251, 253, 257, 262, 277, 526, 529, &c. but if I can apprehend them, those Citations make against the Petitioners.

Then Margery Parker's Case, 9 H. 6. 12, 13. was mightily insisted on, and indeed at first I thought there was something in it, but upon a full Perusal, I find it is consistent enough with my Opinion: Indeed Babington mentioned there a Remedy by Petition to the Barons, but this was only a Word slip'd out; but the Court gave no Regard to it, and were of Opinion against it, that there was no such Remedy. And it is observable, that Brook in his Abridgment takes no Notice of Babington's Opinion, though he does of all the rest of the Case.

The next Thing objected is, That the Barons in every Term send a Liberate to the Officers of the Treasury under the Exchequer Seal to pay Money for Paper, Pens, and other Necessaries for the Court of the Exchequer; the Charge of which, I am told, comes to 2 or 300 L. per Annum.

To this I answer, That first this Writ goes without any Judgment at all; so that according to this, the Petitioners needed not to have had any Judgment; but the true Reason of issuing this Writ is grounded on this: In the Treasurer's Commission there is this Clause, That he shall pay out such Sums of Money as are required, pro necessariis Scaccarii: But of this Writ they take no further Notice than as a Certificate, when they make up their Accounts.

Now for the Precedents.

The Court of Exchequer is guided by Multitudes of Precedents, 2 Rep. Lane's Case, Mo. 565, but here they take not one Precedent for such a Power over the King's Revenue, to which the Law has so great a Regard; for there is nothing in the Law so fenced, so guarded, and so secured, as the King's Inheritance; where

Plow. 230,
320.
2 Rol. 524.
Cro. Car. 513,
528.

where that is concerned, there must be Petition de droit, an Inquisition found, besides Searches, &c. so careful is the Law of the King's Inheritance and Revenue.

But now here the King must lose his Freehold without Trial, which his Subjects shall not do, as appears by Magna Charta.

In the next Place, I shall answer the Cases, which indeed give Life to the present Case, and are the Foundation of it. First, as to Nevill's Case, I observe the Petitioner's Counsel do not agree in their Title to it; some say, it was grounded on a Petition of Right; others, that it was a *Monstrous de droit*; and others, that it was a Complaint against the Officers of the Treasury. But true it is, Mr. Plowden is precise and express in the Point, though it seems to me to be but his own private Opinion: And I must take the Boldness to say, that he is mistaken, as will appear from these Books, 13 H. 7. Pl. 15. 4 Ed. 4. 23. b. 1 Leo. 190. 1 And. 253. Savile 125. all which Cases happen'd but twelve Years after Nevill's, and yet are contrary to it. By the same Books and the same Reasons it appears, that Wroth's Case ought to have no more Weight than Nevill's, &c.

Therefore I conclude, That this Judgment given by the Barons of the Exchequer is an erroneous Judgment, and ought to be reversed.

Vide infra, The Argument of the Lord Chief Justice Holt, contra.

The Argument of the Lord Chief Justice Holt.

Holt, Ch. Just. **I**N this Case, here have been two Points made:

1. Whether this Grant be good?
2. Whether here be a proper Course taken by the Patentees?

There has indeed been a third Point started by my Brother that argued last, and that does respect the entering of the Judgment.

As to the first Question, I hold the Grant to be good, and all that have argued here, have concurred in the same Opinion. I do confess this is the great Point of the Case; but so much has been said to it, that little more can be added: But I must say something to it, though I cannot but repeat.

I hold that King Charles II. might charge this Branch of his Revenue, and my Reason for my Opinion is but short.

P

It

9 H. 3. Stat. 1.
c. 29.
3 Ed. 1. c. 24.
27 Ed. 3.
Stat. 5. c. 4.
28 Ed. 3. c. 3.
52 H. 3. c. 12.
15 R. 2. c. 12.
16 R. 2. c. 2.

Comb. 270,
271, 272.

Whether, and
in what Cases,
the King may
alien his Re-
venue.

It is, because the King was seised of an Estate in Fee of this Revenue; for to such an Estate a Power of Alienation is incident. Lit. Sect. 360. And I take it to be the Intent and the express Words of the Act, That the King should have a Right and Liberty of alienating and charging this Estate.

It is no Objection, That this Revenue was given to the King under a Trust; for notwithstanding that, he might alien it: So several Kings of England have founded Corporations of charitable Uses, and yet these Persons incorporated might, notwithstanding such Trust, alien their Estates; so may Dean and Chapter theirs; so may a Bishop with the Consent of Dean and Chapter; so a Parson, with the Consent of the Patron and Ordinary, might have aliened the Land of which he was seised in the Right of his Church: But the King has no Body required to consent to his Alienations. To say, that he may alien by the Consent of the Estates of the Realm, is as much as to say, he cannot alien without an Act of Parliament, which he may clearly do.

And indeed this Revenue comes to the King by Purchase, for he gave a Recompence for it, (viz.) Part of his standing Revenues, it being the Profits that did arise from his Wardes and Liveries.

But it is objected, That this Power in the King of alienating his Revenues may be a Prejudice to his People, to whom he must recur continually for Supplies. I answer, That the Law has not such dishonourable Thoughts of the King, as to imagine he will do any Thing amiss to his People in those Things in which he hath Power so to do.

But that which I insist on is, that it is absurd in its Nature to restrain the King from a Power of aliening his Revenues of which he is seised in Fee. It is against the Nature of the Being of a King, that he should have less Power than his People; for before he was King, he had Power to alien. Now when the Crown descends upon him, he is seised in Jure Corona, and shall he then have less Power over those very Lands than he had before the Descent of the Crown? Shall he now be disabled to alien by being a King? This would be against a common Principle of Law, that the Descent of the Crown takes away all Disability. Pl. 105. Dyer.

Then it is repugnant to the Constitution of the Government, to suppose a King should be under a present Danger of being im-
bated, if the King could not raise Money by alienating his Re-
venues, the Nation might perish; for he cannot otherwise raise
Money than by an Act of Parliament, for which there might not
be

That the Law
will not per-
mit the King
to do Wrong
to the Subject;
(*Uti a fortiori*
to the whole
Kingdom)

Vide Co. Lit.

19. b.

2 Inst. 681.

1 Co. 44. b.

7 Co. 12. b.

11 Co. 72.

1 Rol. R. 167.

Noy 182.

Mo. 416.

Godb. 317.

Dav. 75.

Cro. Argum.

60.

Pl. 246,

487. b.

13 E. 4. 8.

1 H. 7. 10.

2 Sid. 137,

138, 139,

140, 141,

142.

Vol. 1. Hale's

P. C. 61, 101.

Co. Lit. 16. 2.

be done: And therefore heretofore the Kings of England have borrowed several Sums of Money by mortgaging their Lands. *Cotton's Post. 174.*

And there ought to be a Power in all Governments to reward Persons that deserve well, for Rewards and Penalties are the Supporters of all Governments; and it has been the constant Usage of the Kings of England to reward Persons deserving of the Government out of the Crown Revenue, by Penfions, and giving Estates to support the Titles of Earl and other Dignities. *Seld. Tit. of Honour 898. 7 Rep. 12. Calvin's Case.* And this has been allowed of by Act of Parliament, as appeareth by 34 H. 8. c. 20.

But some perhaps will say, I have been talking little to the Purpose; for that they do not deny that the King might alien his own Demesns, or any Lands that come to him by Descent or Purchase: But, say they, this Revenue was settled by Act of Parliament on the Crown, and therefore it cannot be aliened. But I do not find any such Distinction in our Law-Books, nor any Authority from Common or Statute Law, that restrains the Kings of England from aliening any Sort of their Revenues.

As for the Lands in ancient Demesne, they seemed most appropriated for the King's Use of any of his Revenues; for they had several Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Sustenance and Husbandry, not to be imprisoned on any Inquest; and yet notwithstanding all this, those Lands were always alienable; and if these Lands are alienable, what Estates in the Crown are not alienable? And our Books do take Notice that these Estates are alienable, and so is Fitz. N. B. 13. c. 166. f. & 226. *Stamford Prer. 38.*

Then what Reason can be given why some Estates should be aliened, and others not? Why may not the King as well alien these Estates as he may the Flowers of his Crown, as appears in the Abbot of Strata Marcella's Case? For he may grant a County Palatine, which has Jura Regalia; so he has granted a Power to pardon Treason or Felony, &c. Indeed these Privileges are re-assumed to the Crown by the Statute H. 8. but the Grants were not void.

Then if an Estate be settled on a Subject by Act of Parliament, it will not be denied but that he may alien such Estate; and why shall not the King have the same Privilege? It appears in Fact, that he has always done it; for all the Lands that belonged to the Abbies and Monasteries were aliened by the King,

Ancient Demesne Lands alienable, because possessed by the King in his personal Capacity.

9 Co. 24.

See 27 H. 8. c. 24.

King; and yet they were given to him by Act of Parliament, and by general Assent, as it is here: So the Customs have been always granted and charged by the King, and yet they were granted to him by Act of Parliament. The Authorities in our Books are full to this Purpose, as 21 Ed. 3. 47. 29 Ed. 3. Flo. 1. 2. 4 Inst. 45. Davis 7. 14. Knighton 1684.

But it is objected, That this Revenue was given in Lieu of Inheristances that were unalienable, (viz.) the Wards, Liberties, Purveyances, &c.

Tho' how the Nature of these Inheristances can effect Inheristances of another Nature I cannot see; but even these Inheristances were always in Effect alienable, for they might have been released. The King's Grant to be free of Pilgrage, Sir Thomas Waller's Case; and so were Services in Capite, and Purveyances, &c.

Some Opinions have been urged, which say that the Crown Revenues could not be aliened, as Fleta and Bracton; but these Books are only Ornaments to the Law; they are not looked on as authentick, especially where the Practice has been always to the contrary: But Britt. 87. is otherwise, and so is Seldon 549, and 552. And Bracton himself in his second Book, c. 57. seems to be of another Opinion, where he saith, That even Res sacrae are alienable by the Common Law, tho' perhaps by the Canon Law they are not to be aliened. So the Statute of Bigamis, c. 7. also admits that the King may grant away his Revenues; Forlescue in his Book de Laudibus Legum Angliae, that the Government is not only Regal; but legal and political, and then discusses of the Particulars wherein the Regal Power is restrained: And if our Constitution had been so that the King could not alien his Lands or Revenues, it cannot be imagined but that he would have mentioned a Thing so remarkable, especially in a Time when there were so many Grants made by the Crown, tho' indeed at that Time there were many Acts of Resumption made, as there were before and after, as in 6 H. 4. 14. and in the Time of King Henry the Eighth, &c. which are a great Demonstration that those Grants could not be revoked or abolished but by Act of Parliament.

Fee-Farm
Rents granted
by Act of Par-
liament, and
why.

It is objected, That the Fee-Farm Rents in the Time of King Charles the Second were granted by Act of Parliament; but they might have been granted without that Act, it was only made to encourage Purchasers, to make good the Letters Patents beyond all Scruple, and to give Power to sue for the Arrears of Rent, and to distrain, &c.

Then

that it is the Grant of the Revenue which is the subject of the Petition, that then the King's Directs are the subject of the Petition.

But that does not follow, they are only a species of remedy to their Fellow-Subjects their Right, and the remedy is granted to them by the King's Letters Patents. So the Directs in this case are Over and Terminer, &c. are the King's Directs, and are the subject of the Petition.

As for these Letters Patents themselves, it is plain to the Court, that the King has not decided in the Petition, and the Consideration being overrated, though it be true, that the King has not decided the Grant. Pl. 334.

I conclude this Point, that these Letters Patents which charge this Branch of the Revenue, are good and firm in Law.

I come now to the second Point, and that is, concerning the Remedy taken by the Petitioner.

And I hold that they have taken a very proper and legal Remedy: and are all agreed that they have a Right, and if so, then they must have some Remedy to show it is so.

The Remedy at Common Law to recover against the King, is by Petition, or *Monstrans de droit*.

And there is a new Remedy now given by Stat. 1 Ed. 6. c. 8. and that is by *Writ of Certiorari* to the King's Bench. 4 Rep. 34. 9 Inst. 688.

But still a Petition of Right is not necessary in this Case: for that that a Petition may proceed in this way, and should himself out of Possession if he pleases. But it is not necessary, by two Reasons:

1. Because a Petition of Right is grounded always upon a Matter of Fact, and not of Record: and upon this Petition, there is a Commission issued out of Chancery. 100. Pl. 101. 9 Pl. 2.

2. Because the Petition of Right is grounded upon a Matter of Fact, and not of Record: and upon this Petition, there is a Commission issued out of Chancery.

The Petitioner has not shown in this Case, that the King's Bench is the proper Court to try the Cause, and are generally in possession of the King's Bench.

And the Cause is not turned to a Right, as it were had been in a Petition, &c. therefore why should there be a Petition of Right?

I take this Remedy to be by *Monstrans de droit*, and this Remedy is to be used at Common Law, when the Party's

Remedies to recover against the King. Skin. Rep. 608, 609.

Petition of Right, the Nature of it. 100. Pl. 101.

Monstrans de droit, where lies.

Title appeared of Record. Kell. 178. Monstrans de droit, or Ouster le maine, (which is all one in Effect) always lies where the Title or Right of the King appears, as well by Matter of Record as the King's Title, and this appears fully. Sadler's Case, 4 Rep. and Hob. 324.

Also it is plain, That a Monstrans de droit lies in the Exchequer: I think there is no Doubt of that.

It is objected, That the Petition should be first sued to the King: But by the Records in Ryly's Placita, Parl. 251, 257. Scand. 72. It appears, that these Petitions of Right have been sued to the Court of King's Bench. But indeed this Petition differs from those, for this being only the Writ of Complaint, there needs no Indorsement as in the other Cases.

The next Objection is, That in this Precedent there was a Liberate.

1. This Writ is in its Nature a Writ of Assistance. Reg. 192. but this Writ does not give any Warrant of Jurisdiction; for the Court may hold Plea, and proceed without it.

2. But the next Answer that I give to this, and which may be satisfactory to any Body is the Statute of 5 R. 2. c. 9. which directs the Barons of the Exchequer to answer every Demand, without any Writ or Letter from the King: so is a lib. 110. So that I take it to be very plain, that the Barons might proceed here without any Writ at all.

Power of the
Barons of the
Exchequer to
answer Demands.

Of the Treasurer,

But it is objected, That the Writ should have been directed to the Treasurer, &c.

But this needs not be; for the Treasurer hath nothing to do with Civil Pleas. Reg. 137.

Indeed, Fitz. N. B. 129. hath mention the Treasurer: But this is a common Error, and the Writ need not be so directed.

It's true, as my Lord Coke observes, That the Legitimation of my Case may be suspected that has no Case of his to it, and I agree to that: But I think I have found out some Kindred in the ancient Case, and that is the Case in Coke's Entries, 93. tit. 1. of a Liberate; for there the Barons did allow certain Liberties, and also the Payment of a New Charge granted by the King to my Lord Hunsdon. On the Case of Margory Parker in 9 H. 4. 13. is a considerable Authority to this Point; she had an Annuity out of the Magna Customs of London, granted by the Queen out of a Sum assigned for her Dowry to receive of the Customs. The Queen shall not have Action against the Customs, but must sue to the Barons of the Exchequer; and

to answer the
Writ of the

and Margory Parker may sue for it in the Exchequer, in the same Manner as the Queen might for her Portion. Then there is my Lady Broughton's Case, which happen'd in 25 Car. 2. my Lady Broughton forfeited the Keeper's Place of the New-Bailon to the King, who thereupon made a Seizure; upon this the Dean and Chapter of Westminster came into the Court of Exchequer and claimed the Indemnity, and the King's Hands were removed. Indeed this Matter was first stirred in the King's Bench, for they gave Judgment to seize the Bailon. Now if the Court of King's Bench might hold Pleas there of a Monstrans de droit because the Seizure was there; Why may they not as well proceed in the Exchequer by Monstrans de droit, because the Money is there?

It is true, Money comes into and issues out of the Exchequer without the Barons: But with Submission, the Right of bringing in, and issuing out of the Money, belongs to the Barons, and if you make the Barons only Judges of the Right of coming in of the King's Money, you make them Judges but of Half their Business which belongs to that Court; for the Barons have the Judicial Power over the whole Court of Exchequer. And to say that the Treasurer and his Officers have no Correspondence with the Barons, is not true; for all the Books take Notice of them, as Persons that all belong to the Exchequer.

Some have objected, That this Court ought regularly to hold Pleas only where the King is Party; and that this Court used to be prohibited to proceed in any Pleas that do not concern the King: I last 191. there you may see what Pleas they may hold.

But here the Plea does concern the King; for here is the King's Grant, and the Suit is to the King: And this Determination of the Barons in this Case is not thus any Judgment of their own; but the King himself, by Reason of such his Letters Patents, hath obliged himself to make such Payments. As in the Case of an Obligation where Debt is brought upon it, and a Recovery is had, it is not so much the Judgment of the Court as binds the Property, as the Obligor himself, who by his Bond has subjected his Property to be determined by the Judgment.

Now as to the Authorities which seem directly to govern this Point, and the Objections against them.

1. There is Sir Tho. Wroth's Case in Plowden, which I rely upon as a clear and full Authority in this Case, notwithstanding all the Objections that have been made against it.

King

King Henry 8. has appointed Sir Tho. Wroch to be Clerk of the Court of the Exchequer under Prince Edward, and that he granted to the said Sir Thomas for the Exchequer of the said House an Annuity of 200 l. to be paid him yearly taken to the said Sir Tho. from Lady-day now last past during his Natural Life, by the House of the Commons of his Court of Augmentations of the Revenues of the Crown by the Title being of such his Revenues of the said Revenues, as should remain in the hands of the Treasurer of the Chamber in the Year, &c.

Court of Augmentations.

The chief Objection against this Case is, That where the Grant was under the Seal of the Court of Augmentations, which was incorporated with the Court of Exchequer, but that I deny, for that Court was never legally united to the Court of Exchequer, as was adjudged in Dyer 214. As also the Objection, That Sir Tho. Wroch's Grant was under the Seal of the Augmentation-Court, and under the Surcoat of it, is gone.

Then it does not appear to me, that that the Court of Augmentations had any Power expressly given them to receive the Grants of such Revenues. I have looked over the Act of Parliament, by which that Court is constituted, but I cannot find any such Power: But I think, the Court of Augmentations has proceed in such Manner, that it might be also reputed a Court of Exchequer, and the Court of Augmentations is by express Statutes made a Court for the new Revenues that should come to the Crown, which are exempted from the Jurisdiction of the other Courts: But that which I infer from hence is, That if this new Court of Exchequer be in some Cases better than the old Court of Exchequer, &c. certainly the old Court of Exchequer shall have the same Privilege.

There are other Courts which have also proceeded in the same Manner, as the Court of Wards and Escheats, both Part of their Statutes. As Charles 5. Queen Elizabeth granted to Allen under her Great Seal, an Annuity of 200 l. per Ann. to be paid by her Highness of the Court of Wards. This being payable by the Receiver, is in the Nature of a Rent-charge. So the Court of Surveys, created by 25 H. 8. has proceeded in the same Manner, and sells the Quarters of Rent-charge, &c.

As to Nevill's Case also in Plowden, I take it to be a full Authority in Point. An yearly Rent-charge of 100 l. was granted to Sir H. Nevill, and another for the Exchequer of the Office of Keeper of a Park, out of a Manor for their Lives, was also granted, the same Manor came to the Possession of the King, the King's Hall neither was the Office nor the Rent, and the Arrears of the said Annuity were paid to Sir H. Nevill at the

Receipt

Receipt of the Exchequer by the Hands of the Treasurer and the Chamberlain.

First, I grant that those Lands were also under the Survey of the Court of Augmentations; but that I conceive makes nothing against me for the Reasons before-mentioned.

There are several other Records which have been already quoted, but I shall not trouble you with the Repetition of them. I shall only mention some few, which I think have been omitted, as Trin. primo Mar. Rot. 126. 2 El. Rot. 145. Mich. 13. Q. Rot. 347. Hill. 13 El. Rot. 143. P. 1 Q. Rot. 108. In all these Records it also appears, that Money issued out of the Exchequer, by Order of the Court of Exchequer; and it is highly reasonable that they should have such a Power.

Money issuing out of the Exchequer by Order of the Exchequer.

Suppose the King purchaseth Land that is charged with a Rent, the King must take the Land together with its Burden; but in such Case it would be too hard to give the Grantee of the Rent to his Petition of Right to the King: No, certainly he may come to the Court of Exchequer, by Way of Petition to the Barons, who may give him Relief.

It has been objected, That Money which once comes into the Exchequer can never be taken out. Reg. 193. But if this is true in a general Sense, that none of the King's Revenues that are brought into the Exchequer can be paid out, this would destroy all Annuities, Rents-charged, and other Payments which the Crown is obliged to make.

It is true, if a Man be outlawed in the King's Bench, and the Party's Goods are seized in the King's Hands, and then the Outlawry is reversed, there can be no Restitution. The Reason of this is, for that the Court of King's Bench cannot send a Writ to the Treasurer; and the Court of Exchequer have no Record before them to issue out a Warrant for a Restitution. So if an Attainder be reversed, the mean Profits taken into the Exchequer cannot be restored for the same Reason; and also for that the King cannot be made a Dissessor, and the Statute gives a Remedy only as to Parliament.

Restitution of outlawed Goods, and on Attainder.

There remains after all a great Objection, had it any Weight, and that is, Cui bono? If the Patentees should have Judgment for them, what will it signify if they cannot come at any Money?

As to this, I do think, that as soon as the Writs are delivered to the Officers of the Exchequer, I mean the Treasurer and Chamberlain, the Property is altered, and the Officers become Debtors to the Parties, as appears by 2 H. 7. So as soon as a Fieri facias is delivered to the Sheriff, and upon it

Action of
Debt on a
Liberate, and
why.

Vide ante 13,
14, 48.

Skin. Rep.

257.

1 *Salk.* 323.

2 *Vent.* 97.

3 *Sand.* 47,

344.

Goods are levied, the Property of the Goods is altered, and the Sheriff becomes a Debtor to the Plaintiff: So an Action of Debt will lie upon a Liberate, and so it has been adjudged.

I shall only observe one Thing more, and so conclude, and that is in Answer to my Brother who argued last; for he struck very hard at the Judgment given by the Barons. He thought that it was very erroneous, and therefore void; but with Submission, I take this Judgment to be as well as it can be: And whereas it is said in the Judgment, That the Money shall be paid by Commissioners and Chamberlain of the Treasury, it must be understood of the Receipt of the Treasury, and not of the Lord High Treasurer, which Office is long since expired.

As for the levying of the Tailles mentioned in the Judgment, it does not hurt, it is at most but Surplusage; but that which I insist on is, That though this Judgment, in Respect of Form, or any material Point of it, should be erroneous, yet if your Lordship should be of Opinion in the two first Points with me, you will then give a new Judgment, such as the Court of Exchequer ought to have given, for that is the Law of this Place, as appears by 31 Ed. 3. And this last Point was so ruled upon a Debate in the House of Lords, and was the Case of the King and Sainthell, 30 Car. 2.

So that upon the Whole I am of Opinion, That the Judgment given by the Barons ought to be affirmed.

But afterwards the Lord Keeper was of Opinion to reverse the Judgment, and accordingly it was reversed. The Ground upon which he gave his Opinion was, That the Patentees had not taken a proper Remedy by Petition to the Barons, who have no Power or Control over the King's Treasury, &c. and that their only Remedy was by Petition to the King himself. He insisted much upon the same Reasons and Grounds which my Lord Chief Justice Treby went on.

Petition to
the King, and
not to the Ba-
rons.

DE

D E

Term. Sancti Mich.

Anno 7 Will. III.

Bush *versus* Allen.

THE Point is this: A Man deviseth to Jane Shore the Wife of J. S. the Issues and Profits of certain Lands to be paid by his Executors: Whether this be a Devise of the Land to her for Life, is the Question; or whether the Executors shall receive the Profits to the Use of the Devisee?

Chief Justice. To be paid by the Executors to her, shews the Testator's Intent, that the Husband should have nothing to do with it. Why should not this be a Devise to the Executors for her Life, upon Trust to pay the Profits to her? And this is fully to perform the Will; the Intent of which was to exclude the Husband wholly. *Adjourn.*

At another Day.

Chief Justice. The Question is, If this be a Devise of the Lands to his Wife for her Life, and that the other Words shall be void; or whether it shall be to the Executors for her Life? It seems to me to be a Devise to her; for a Devise of the Rents and Profits is a Devise of the Land itself; and if this shall not be construed a Devise to her, then the last Words contradict the former; and then you will make a Devise by Implication to the Executors against an expresse Devise before.

Rokeby, Justice. But then the Husband shall intermeddle where the Devisor intended to exclude him. Moore 753, Griffith *versus* Smith is the Case that I rely upon. A Man possess'd of a Term

Vide 3. C.
1 Salk. 228.
South versus
Allen.
Vide post. 98,
101.
Co. Lit. 4. b.
Devise of Rents
and Profits to
be paid by Ex-
ecutors.

Devise of Rents
and Profits is
of the Land.
Vide Tels. 73.
1 Cro. 368.
3 Cro. 674.
734.
Comber. 375,
Cases in Law
and Equity 94.
1 Vern. 104.
2 Chan. Rep.
117, 118,
119.

a Term for Years of Lands, devised the Profits thereof for so many Years as he should live, and after he devised the Profits thereof to twenty of his poor Kindred; and that after the Death of his Wife the Lands should be let by the Advice of his Overseers, and the Rent distributed to his said poor Kindred, and made his Wife Executrix. Resolved by all the Judges in the Exchequer-Chamber, That although a Devise of the Profits is a Devise of the Land itself, if there be no other Circumstance in the Case, yet because the Devisor hath declared, that the poor Kindred should not have the Property of the Term, and he appoints a Lease to be made for Rent, the Executor hath the Term upon the Consideration to make the Lease and Distribution, and the poor Kindred had only a Trust, and no Interest.

Vide 1 Salk.
228. *contra*,
which seems a
Mistake.

Chief Justice. In that Case it remained in the Executor, and not in the Devisees.

Eyre, Justice. I think the subsequent Words make it a Devise to the Executors in Trust for the Wife.

Judgment pro Defendant, Chief Justice dissentiente.

Lord Gerard's Case, B. R. on Error.

S. C. Lev.
401. 1 Salk.
54. 253.
Dower of a
Caput Baro-
nie.
Vide Co. Lit.
30. b. 31. b.
Glanv. lib. 6.
cap. 1.
Bract. lib. 2.
fol. 92, 93.
96.
Brit. cap. 101,
103.
Fleta. lib. 5.
cap. 22, 23.

LADY Gerard brought a Writ of Dower, and demands the third Part of a Capital Messuage called Bromley-Hall. Defendant pleads, That Time out of Memory it had been called as well by the Name of Gerard's Bromley as Bromley-Hall, of which Sir Thomas Gerard Knight, was, 1 Jac. 1. seised in Fee; and was by the said King James created Lord Gerard of Gerard's Bromley, he being Resident and Command with his Family in the said Capital Messuage; and the said Messuage then became Caput Baronie sua, and derives the Title of the Messuage and Barony to himself by others Descents, and demands Judgment if he shall be endowed of it, and avers, that he has assigned to her a third Part of his other Lands, &c.

The Demandant demurs generally, and the Court of Common Pleas gave Judgment for the Demandant.

And now a Writ of Error is brought in B. R.

Counsel for the Plaintiff in Error.

Which Submission this is an erroneous Judgment.

The

The Reason of the Judgment in the Common Pleas was, that now there is no such Thing as Caput Baroniz; but I hope to prove there are at this Day many Capita Baroniz, and that they are exempted from Dower: And this appears in the first Institutes, 31. b. Bract. Lib. 2. 93. Fitz. Tit. Dower, 80. 4 H. 3. Rot. 7. Britt. 247. Mr. Dugdale's Summons to Parliament. Of the Capital Messuage the Wife shall be endowed, si non sit Caput Comitatus five Baroniz; and that this Privilege is Personal, appears in i Inst. 16. 2 Inst. 9. Selden Tit. of Honour, 552, 557. The antient Way of Creation of Barons is altered: The King seldom creates a Baron, and gives Barons, &c. ad sustentandum Nomen & Onus, (viz.) to give him Lands to hold of him in Chief, but grants an Annuity.

Vide Co. Lit.
9. b. 16. b.
31. b.
4 H. 4.
Fitz. Dower
123, 180.
9 H. 7. 1.
Bro. Dower
102.
2 Cro. 18.
The antient
Way of crea-
ting Barons
altered.

It is objected, That where a Woman is once intitled to Dower, the King cannot deprive her of it, yet he may do it obliquely by this Means of making a Barony; so the King cannot exempt a Man from Arrests, or being on Turtles; yet he may create a Man a Nobleman, and then he shall be exempted from all Arrests, and from serving on Turtles.

Another Objection is, That she shall have an Equivalent: But indeed that I take to be absurd; for either she has a Right or not; if she has a Right, then there needs no Equivalent.

As for the Recompence she has in Lieu of this Dower, she has the Honour of being a Countess; and there are many Women in England would be contented to lose a great Part of their Dower to be made Countesses.

Then I take this Judgment to be ill, because of the double Amercement that is laid on my Lord Gerard; and for this I rely on the Resolution in 5 Rep. 58. Specor's Case, That one shall not be twice amerced in one Action against one and the same Tenant, where the Defendant pleads several Issues, and are found against him.

And prayed that Judgment may be reversed.

Wright, Serjeant, econtra.

By these Pleadings, it is not shewed how this House was made Caput Baroniz, so that your Lordship may judge it to be so.

It is shewed, that Sir Thomas Gerard was made a Baron, but it is not said there was any Barony made; and that there may be a Baron without a Barony, appears in Magna Chart. cap. 2. 2 Inst. 9. where it is said, the Heir of a Baron shall pay no Relief, unless he had a Barony. The Legal Constitution of a Barony is, when the King doth create certain Lands to be a

Skin. Rep.
592, 593.

*Legal Consti-
tution of a
Barony,*

Barony, and there were generally Castles fit for the Defence of the Realm.

It is very strange, that because Sir Tho. Gerard was made a Baron, that therefore his House must be a Barony, and that his Wife must be deprived of her third Part of it, to which she had once a good Title: Coke saith, in Chapter of Dower, the Wife shall be endowed of all Demises, and this is one.

As for the Indecency that the Wife might convert her third Part to an Inn, or introduce Innates, &c. the same may be said of a Commoner, but was never any Objection.

As for the Authority of my Lord Coke in his 1 Instit. it is not his own Opinion, but only cited as the Opinion of those ancient Authors. It is said in the Comment on Magna Charta, That the Wife shall have her Quartautein in the Chief Seat of her Husband, nisi sit Castrum, or Caput Baronie; so that they are the same, for their Chief Seats were frequently Castles, and in such Case she should not have been endowed; but where she shall have her Quartautein, there she shall be endowed: That is a Rule. As for the double Amercement, it is true, a Man shall not be twice amerced for the same Thing, but here the Demands be of two several Things. 1. Of the Hundred and Rents upon which Judgment was presently given. 2. For the House; and upon that my Lord Gerard has specially pleaded, and we have Judgment on the Demerret to that special Plea. A proper Judgment may be affirmed.

9 H. 3. Stat.
1. c. 7.
20 H. 3. c. 1.

Baronies,
what?
Vide lib. Feud.
lib. 2. Tit. 39.
Seld. Tit.
Honour. 880,
883.
Deddr. of
Hon. &c.

Holt, Chief Justice. What is the Barony? It is not because it is the Chief House. Baronies were anciently out of Places. A Barony is when the King gives Lands or Rents to the Person he designs to make a Baron, and that he is to hold per Baroniam; and in such Case something might be said to exclude a Woman from Dower; for there were Castles also generally granted to do Service to the King: But indeed since the Time of R. 1. that Barons have been created by Patents, there have been few Baronies made.

Then how can this House be made a Barony, that was always in the Family of the Gerardes; and here it was no Castle neither?

Rokeby, Justice. When a Barony was anciently granted, there was a Castle with a Territory also granted. Suppose there be a Barony of Stafford, and all the Houses in the Town or Scapels belonged before to the new Baron, which House shall be called Caput Baronie?

Chief

Chief Justice. As for the double Amerciament, there may be several Amerciaments for several Offences, the Reason of the Amerciament is the Oem, and if the Defendant comes in at the first Day, it must be entered of Record, or it signifies nothing. Suppose there be an Action brought in two Dees, and non est Factum is pleaded to one, and a Special Plea to the other, and Judgment is given for the Plaintiff in both Cases; why certainly, here shall be several fines, if they enter several Judgments: It is true, if they enter but one Judgment, there shall be but one Capiatum. So it is of Actions of Assault and Battery against two, and the one justifies, and the other confesseth the Action.

Judgment was amended.

Amerciament.
Skin. Rep. 193.
Comberb. 352.
8 Rep. 63.
2 Sand. 196.
5 Rep. 37.
Rolls Amerc.
213, 276.
Fitzher. Tit.
Judgment,
pl. 32.
2 Leon. 186.

Winchurst *versus* Masely.

MR. Carthew moved for Leave to quash his own Writ of Error, to reverse a Fine, because one of the Parties to the Fine is omitted in the Writ of Error.

One of the Parties to the Fine omitted in the Writ of Error to reverse it.

Chief Justice. We cannot do it. How can we take Notice of any Thing but what is on Record? We cannot quash it on a Foreign Suggestion.

There was a Case in Pemberton's Case, where a Fine was levied by three, and two of them brought Error to reverse it, perhaps the other had nothing in the Land, and it was reversed.

Vide 1 Salk. 49, 88.
Mod. Cases in Law and Equity, 1st Pt. 316, 317.

But this is to be considered, that if a Man be intitled to be Tenant by the Courtsey, and he joins in a Fine with his wife of those Lands; whether his Title to be Tenant by the Courtsey, is not extinguished if the Fine be reversed after her Death. Indeed, if the Fine is reversed in her Life-time, he may have a new Title: If the Husband makes a Feoffment on Condition of his Wife's Land and he dies, and then the Condition is broken: Shall he be Tenant by the Courtsey?

Then you can't have any Costs if the Party enters a Non Pros; for the Statute gives Costs on a Writ of Error only when it is in dilatorie Executions.

Costs on a Writ of Error.

We cannot let you quash it: But let them show Cause why you should not discontinue, Writs of Error are rarely discontinued, but sometimes they may be.

1 Salk. 194, 195.

Dashwood's

Dashwood's Case.

Debt on Judgment in B. R. Error pending in the Exchequer Chamber pleaded.

CU R. In Debt on a Judgment here, (in B. R.) Error pleaded pending in the Exchequer Chamber, is good in Abatement; but if the Defendant concludes, non debet respondere quousque, it is not good, for we have no Re-summings.

1 Sid. 236, 253. Pal. 187, 303. Ray. 100. 1 Lev. 193. 1 Mod. 111. 2 Mod. 194. Comber. 48, 199, 211, 229, 332, 475, 475. Skin. Rep. 388, 590, 591. Cases in Law and Equity, 166. Carthew 200.

Lewfly versus Budd.

CHIEF Justice. This Case stands for the Resolution of the Court.

2 W. & M. sess. 2. c. 8. Contribution to Scavengers Rates.

Vide Saunders.

423.

2 Inst. 673.

762.

2 Rol. 289.

Cro. El. 679.

843.

1 Bull. 20.

2 Rol. Rep.

262.

3 Co. 67.

1 Mod. 73.

3 Leon. 208.

1 Sid. 218.

Ps. 393.

It is on two Orders grounded on 2 Wil. & Mar. For Scavengers Rates for Cleansing the Streets of Newington. One Order saith, That all the Inhabitants shall contribute to it; the other saith, that only those that live on the Pavement shall contribute: And the Question is, which of them is good?

We are of Opinion, that all the Inhabitants shall contribute. For tho' it may be thought hard, that they shall pay any Thing towards the Pavement who do not live on it; yet the Words of the Statute are so strong, that it lays the Charge on all the Inhabitants without Distinction; and where the Statute doth not distinguish, we have no Power to do it. Now in Newington, there is a Street that is paved, and a great Part of the Town that is not; and there are several of the Parish that live out of the Town, and yet they are all bound to contribute.

Besides, they that live on the Pavement are bound to pave their own Doors, then they are not exempted from repairing the High-Ways; and therefore it is as reasonable they should repair the Pavement of which they have the Benefit; and an indefinite Proposition is equal to a general One.

Then the Statute appoints, That they who do not live on the Pavement, as well as they who do, shall settle the Rates; and therefore it is reasonable that they should contribute to their own Rates.

Then the Penalty of the Scavenger is given to the Overseers generally. Now this would be on the Statute 13 and 14 Car. 2. we cannot tell: But on this Statute, all the Inhabitants ought to contribute towards the cleansing of the Pavement; and therefore one of the Orders is good, and the other is bad, and ought to be quashed.

Walker

Walker *ver.* Slackoe. (*Vide supra*, p. 16.)

(Quere, If the Defendant's Name should not be Stokoe.)

IN a Writ of Error, all the Parties to the first Judgment did not join.

Chief Justice. The Question is, If this Writ of Error be amendable? It appears here that the Writ of Error is not good, for all the Parties to the first Judgment ought to join in Error, and it appears they have not done so here; for it not being said, be that is omitted is dead, the Writ of Error is ill. But supposing that this is only a Mistake of the Curator, the Question is, If it be amendable? And we are of Opinion that it is not, because this is a Writ to reverse Judgment; and the Statutes were only made to amend Writs for the Support of the Judgment. So is 8 H. 6. c. 12.

But if this Fault were amendable, yet we think it must not be at the Motion of the Defendant; for no Man can pray to amend another's Plea or Writ; he may take Advantage of it, but cannot pray to have it amended: For every Man may sue or plead as he thinks fit, but this would force him to sue in another Manner, and it is not within any of the Statutes.

The second Point is grounded on the Reason in Blackmore's Case, 8 Rep. 158. b. they have Power of Amendment in Alterance of Judgments. And in no Case whatever did the Court amend to set aside a Judgment, but only to support it; and that was the Design of all the Statutes.

Cur. Let the Writ of Error be quash'd.

Chamberlaine *versus* Hewson.

THE Case here was this: Mrs. Hewson, the Wife of Colonel Hewson, sues the Plaintiff Mrs. Chamberlaine in the Spiritual Court for Adultery with her Husband, and had Sentence there, and recovered Costs against her 80 l. Then Mrs. Chamberlaine procures a Release of Colonel Hewson under Hand and Seal; notwithstanding which, the Wife prosecuted her in the Court Christian for the Costs. Upon which it was moved here for a Prohibition, suggesting that the Ecclesiastical Court had no Cognisance of this Deed of Release.

T

Wright

Writ of Error where the Parties to the first Judgment did not join, not amendable. Comb. 374. 375. *Vide* 1 Sid. 104, 138, 139, 193. 1 Leon. 134. 1 Lev. 99. 3 Co. 2. 1 Mod. 153. Amendment.

6 Mod. 276, 285, 286.

S. C. 1 Salk. 115. The Husband's Release to bar the Wife of her Costs in the Spiritual Court. Cases in Law and Equity, 63. *Quere* 2 Lev. 161. 1 Sid. 346. 1 Salk. 115. to 119, 207.

1 Vent. 220.
2 Salk. 552.
Cases in Law
and Equity,
386.

2 Rol. Abr.

296.

Plo. 13, 16,

305.

Plo. 12.

5 Co. 31.

1 Rol. Abr.

295.

Plo. 32.

Cro. El. 782.

Carter 97.

2 Kib. 612.

Ramond 119.

1 Sid. 99, 146.

Cro. Jac. 217.

666.

2 Sid. 143.

Carth. 152.

1 Salk. 119.

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Wright, Serjeant, argued, That no Prohibition ought to go to the Spiritual Court, for that they had Conscience of all this Matter, and that it was a Rule in Law, *Ubi cognitio Principalis, ibi cognitio Accessarii*; so that it is not material, whether the Release be good or not: But the Point is, Whether this Court will think fit to meddle with it, since the Original Cause is cognizable by the Spiritual Court? There is a Case in Roll Abr. 390. *Tit. Prohibition*, where a Release was likewise pleaded in the Spiritual Court as it is here, and a Prohibition was denied; and it is such Cases the husband's Release should be good to bar the Wife of her Coits, all Suits of this Nature would be eluded; for it is the Coits that are reckoned the most grievous Punishment in this Court: There are but two Sorts of Punishment there, Penance and Coits; and the Penance too may be dispensed with for Money.

Sir B. Shower, econtra. We hope that a Prohibition shall go; since the Ecclesiastical Court has refused to allow this Release, which with Submission they ought not to do; for the Coits, as soon as they are paid to the Wife, belong to the husband; and therefore he may release them before they are paid.

So the Rule put by Sir Serjeant, is fallacious; for in many Cases they cannot proceed in the Spiritual Court, tho' the Original Cause be within their Jurisdiction. So in *Yel. 29. Goodwin's Case*, Executor comes into a Bond to pay a Legacy, he is sued in the Spiritual Court as for a Legacy, Executor pleads Payment according to the Bond, they would not allow the Plea; a Prohibition was granted; for the Executor by giving Bond for Payment of the Legacy had exting the Legacy, and made it merely a Debt at Common Law. 3 Cro. 309. A *Feme divorced Cause Adulterii* of the husband, sues in the Spiritual Court for a Legacy: Defendant pleads the Release of the husband made after the Divorce, which was dissolved in the Spiritual Court; a Prohibition was granted; for this Release was good, for they remained *Man and Wife* notwithstanding the Divorce. 2 Rol. Abr. 561, 592. Therefore we pray that the Prohibition may stand.

Chief Justice. After that Rate they shall see the Validity of Letters Patentes, and of Writs, &c. If they have Conscience of the Original. Indeed, if they make an ill Construction of the Law, we'll prohibit them; if they would not allow a Release unless proved by the Witnesses, we would prohibit them;

Prohibition to the Spiritual Court, in which Case, Cases in Law and Equity, 63, 64.

them; as in the Case of Shotter and Friend. The Spiritual Court are confined within their Compass, and if they go beyond their Line, we will fetch them back by a Prohibition; for under that Notion of Ubi cognitio Principalis, ibi cognitio Accessarii, they may do as they please, and so subvert and destroy the Common Law. Indeed, if the Suggestion had been that they refused to receive this Plea, it might be something.

Rokeby, Justice. Sir Bartholomew Shower, your Client does not deserve any Favour; but he must have Justice.

At another Day, this Matter being again stirred:

Chief Justice. If a Feme Covert sues sole in the Ecclesiastical Court for Defamation, as she may, if she cohabits with her Husband, he may release the Costs; but if they are divorced a Mensa & Thoro, there in such Case, or of Incontinency, &c. he cannot release the Costs; and the Reason is, if they are divorced a Mensa & Thoro, the Husband allows his Wife Alimony, and the Costs of the Suit are out of the Alimony; and therefore he cannot discharge one more than the other. 2 Roll. 301. Motam's Case is the very same, and the same is in Bullstr. Baron and Feme divorced Causa Adulterii a Mensa & Thoro; the Feme sues in the Ecclesiastical Court sole against one for Slander. Sentence is for her, the Husband releaseth all Actions, and this very Suit, &c. The Defendant pleads this Release in the Ecclesiastical Court, which was disallowed, yet no Prohibition was granted; in Case of a Legacy aliter, yet if the Suit be there for a Legacy devised to the Wife, which is originally due to the Baron and Feme, and is not a Part of the Alimony, he may release the Suit and also the Costs, because he may discharge the Principal.

My Opinion is, That there should be a Prohibition in this Case. But here you say Alimony is sentenced to Hewson's Wife; prove that, and then it is in our Discretion not to grant a Prohibition: As if it is suggested, that the Party is cited out of the Diocese, we prohibit them; but on Proof that it is upon Request to the Archbishop, as is the Exception in Stat. 23 H. 8. we can stop the Prohibition.

Bonoyon versus Palmer.

Carthew. This is on Replevin, in which the Defendant avows in his own Right; and it appears, that B. assign'd a Rent to thirteen, four of which are dead, and the Defendant

Vide 2 Lev.

161.

1 Sid. 346.

1 Salk. 115,

&c.

Feme Covert

sues for Defa-

mation, the

Husband may

release the

Costs, except

in Case of Di-

vorce.

2 Roll. 301.

1 Salk. 115.

Of Suit for a

Legacy.

Comb. 105,

106, 448.

Carth. 33, 34.

23 H. 8. c. 9.

One Jointe-

nant distrains

alone for

Rent, how

to avow.

Vide ante 25,

&c. post. 73,

141.

Of a Joint-
tenance by
Tenants in
Common.
Vide ante 25,
26, &c.

is one of the nine Surshings, and shows the taking the Distress in his own Right, because the Rent is Arrear, which he cannot do; but it ought to be in his own Right, and as Bailiff to the rest, and they ought not to have severed.

Northey. This is but Form. If we had abated for a ninth Part, it had been ill in Substance, because there is no such Thing as a ninth Part; but on this special Matter shewn in the Abowry, it is but Form, and one Jointenant by Law may take the whole Profits of all the rest, and his Discharge of it is good. Co. 2. 68. 2 Cro. 282. Bowles ver. Poor. Payment of Rent to one Jointenant, is good. Rent-charge granted to a Feme sole, which is Arrear, and she marries; the Abowry supposeth so to be in Arrear, not paid to Baron and Feme, was held good.

Russ. Ent. 565.
Carrh. 329.
Comb. 2, 330.

347.

Holt. 133.

3 Brownl.

Ent. 339, 340.

1 Brownl.

Ent. 17, 18.

Old. Ent. 94,

95.

1 Rol. Abr.

320.

1 Salk. 390,

391.

Carthew. One Jointenant cannot distrain for all the Rent alone, for they must all join in Abowry, and so must Tenants in Common even for Damage-feasant.

Rokeby. Justice. It seems to be but Form, for one Jointenant may take all the Profits.

Chief Justice. If all ought to join, then it is not Form, but Substance; for it shews, that the Rent is not taken in the same Right it was Arrear; but the Question is, If they needs must join? All the Entries are, That they do join not as Bailiff to the rest, but as Jointenant, and he shows the Taking of the Rent as in Lands liable to the Distress of him and the rest; if he had said, To his Distress only, it had been bad; because the Rent is not due to him only, but to him and the rest; But he need not show as Bailiff to them, for he needs no Authority from the rest to distrain, but he may do it by Law; and so the Defendant has showed here as in Lands liable to the Distress of himself and the rest.

Carthew. Then it is not said through the whole Record, that they were seised in Fee; but it is only generally, that they were seised.

Chief Justice. They should have said so; for tho' by Intendment, seised may be taken to be in Fee, yet they ought to shew it; But however, this here is well enough; for you say, the Rent was

was granted to them and their heirs, and that they were seised of it, which must be underbond in fee.

One Jointenant may distrain for the whole in Point of Interest, and not have any Authority from the rest as Bailiff; for then he is to render an Account.

Carthew. Then they say, the Locus in quo is Parcel of the Tenements hereafter mentioned, which he shews to be in several Parishes, and does not shew in which Parish the Locus is.

Chief Justice. That is not so well as it ought to be.

At another Day.

Carthew. As to Wise and Bellant's Case, 2 Cro. 442. which was in Replevin, the Defendant avows, because his Ancestor was seised in Fee, and let the Land in qua, &c. for Years rendering Rent; and for Rent due to him and his Wife, he avows the Taking. Verdict for the Avowant. Exception was taken in Arrest of Judgment, because the Baron sole avows, and did not join the Wife with him; whereas it appears, the Rent was due to him and his Wife, and he ought not to avow in his own Name only; but because he shewed the Truth of the Matter as it is, and did aver the Life of the Wife, and so the Distress well taken by him, the Avowry was adjudged good enough: That was, because the Rent belonged to him; but if it had not been in the Case of Jointenants, it had not been good.

Chief Justice. Suppose one Jointenant should bring Debt for Rent, and it appeared that the other was alive, it should be bad. He may distrain alone, but then he must avow in his own Right, and as Bailiff to the other; and then the Return must be adjudged to him in his own Right, and as Bailiff to the other, in which Case he is accountable to the other: But if we give Judgment for him in this Avowry, we must adjudge the Return of the whole to him in his own Right; and tho' Payment to one Jointenant is so to the other, yet we must not give Judgment for him alone, to have it in all his own Right.

I think the Avowry ought to abate; but this being upon a Demurrer, the Question is, If we shall give Judgment that the whole Avowry shall abate, and to begin de Novo; or only that it shall abate, and there be a Repleader?

Per Cur. The Avowry is naught.

One Jointenant distrains alone for Rent, how to avow.
Ant. 25, 71.

Post. 77, 78.

Reynolds *versus* Osborn.

Stat. 22 & 23
Car. 2.
No more Costs
than Damage.
Vide 2 Lev.
124, 125.
Carr. 224,
225, 437.
Comb. 42, 43,
75, 224,
449, 450,
482, 297,
399, 420,
324, 242.

Counsel moved for Costs on a Writ in Trespass, for breaking his Close, and breaking his Soil, and 1s. Damage given; for he said it was not within the Statute of 22 & 23 Car. 2. c. 9. which does not extend to voluntary, but involuntary Trespass only; as walking over the Ground.

Econtra. There have been Attempts to turn Trespass into Case, to get Costs; but no Costs shall be given in this Case more than Damage, unless the Judge who tries it, certifies that the Title was in Debate. I agree, that if the Defendant takes away any Thing, he shall pay Costs; but here was only a little Digging; if he had carried away the Soil, then indeed the Plaintiff should have Costs.

Rokeby, Justice. I remember a Case in B. C. where it was said *Quod solus subvertit cum aratro*, and Costs were allowed; and what Difference is there in that from this?

Chief Justice. Ploughing a Man's Soil is quite another Thing; the Statute extends to Trespass on the Freehold, and not to any Trespass on Goods and Chattels: It will be an hard Matter for you to get Costs here. In the Case of *per quod Servitium amisit*, the Costs are not there given for the Battery, but for the Degree of it, (*viz.*) the Loss of the Service.

Adjorn.

Skin. Rep.
363, 367,
561, 666.
Cases in Law
and Equity,
26, 156.
Mod. Ca. in
in Law and
Equity.
Part 1. 371,
372.

The King *versus* Davis and Carter.

S. C. 3 Salk.
461.
3 Lev. 426,
427.
Vide 2 Salk.
514, 689.

DAVIS and Carter being convicted for forging a Bill under the Seal of the Bank of England, and having stood in the Pillory for it, were now brought up to the King's Bench, and prayed, That they might be turned over to the Marshall, because the Sheriff of London oppressed them in Newgate; where they were detained till they paid the Fine, &c. and their own Advantages were offered to prove the Oppression.

Chief Justice. See Co. Lit. 6. b. and Hale's Pleas of the Crown. If a Man has had an infamous Judgment, and has stood on the Pillory for an Offence, which is contrary to the Faith,

Faith, Credit, and Trust of Mankind, as forgers is, he cannot be a Witness in any Cause. Hale saith, If he has been on the Pillory, he cannot be a Witness; but that is to be understood for an infamous Judgment: But if a Man be convicted for a Libel, and has been in the Pillory for it, yet perhaps he may be a Witness.

One that has had infamous Judgment, cannot be a Witness.

Ant. 17.

2 Salk. 461.

513, 514.

689, 690.

3 Lev. 426.

427.

1. Hale's

P. C. 301.

302, 303.

2. Hale's

P. C. 280.

281, 282.

Shower. Canning who was convicted for a Libel and stood on the Pillory, was allowed to be a Witness before the Delegates, my Lord Chief Justice Treby, and other Judges being there; and so Aaron Smith was an Evidence in Crosby's Case.

Chief Justice. Aaron Smith was pardoned, and we gave no Opinion to this Point: But for my Part, I don't understand the Nature of his Offence; it was only for giving Stephen College Notes how to defend himself on his Trial.

In the principal Case, the Affidavits were not read: But the last Day of the Term, the Court ordered the Sheriffs to return Money which they had taken from them; and remanded them to Newgate.

Lewisse versus Masters.

J. S. dies intestate in London, and Godspit his Creditor attaches Money in the Garnishee's Hand, and it is condemned before any Administration actually granted, it being at that Time contested before the Archbishop.

Post. 92, 93.

Creditor attaches

Money in the

Garnishee's

Hand, before

Letters of Ad-

ministration

taken out.

Customs of

London.

Post. 93, 160,

440.

Comb. 109,

347, 427.

Sir B. Shower. I take this Manner of Proceeding to be good by the Custom of London. It is true, their Customs are different from the Laws of the Land, and yet are good, for they are confirmed by Act of Parliament; in General Indebitatus Assumpsits are good by the Custom of London, &c.

Chief Justice. It is one Thing if a Custom be different from the Law, and another Thing if it be repugnant to it and unreasonable. I confess, the Custom of Garnishment is reasonable, for there are two Debts discharged by it: For if A. be indebted to B. and C. be indebted to A. now C. standing against B. in Lien of A. by the Payment of that Debt by C. to B. both the Debts to A. and B. are discharged and satisfied. Now in this Case, A. hath at the same Time a Remedy to recover against C. which by the Custom is transferred to B. but in our Case, the Creditor Godspit would have Remedy against Masters the Garnishee,

The Custom of Garnishment.

nildee, when the Archbishop had none, and would discharge the Garnishee against the Archbishop, who had never any Claim against him, which certainly is absurd, and wholly differs from the other Case; for there A had a Charge against C and by his Payment to B. C. is discharged from A. But there can be no Custom to support this Case; for Customs that overthrow the Principles of Law, and which are unreasonable, are to be rejected.

Dee. Were the Ordinary had the Goods in his Hands, and had intermeddled; And why should he not be charged? The Customs of London are in many Cases different from the Common Law; so an Executor is chargeable there, upon an Action of Debt grounded on Simple Contract; and the Judgment in such an Action has been allowed to be a good Bar here.

Chief Justice. So it is, as was adjudged here in the Case of Palmer and Lawson twelve Years ago.

But here was a Trick too, to put in a Caveat to the granting of Administration 'till the Pleint was finished.

Rokeby. Can you charge any one by this Custom that is not a Debtor? And here the Archbishop is no Debtor.

Chief Justice. At another Day.

We think in this Case, that the Debt was not well attached; for the Ordinary had no Way to recover the Debt, nor had any Thing to do with it.

Let the Plaintiff have Judgment.

Gardner versus Hobbs.

THIS is an Action of Trespass, and the Defendant justifies by Virtue of the Stat. 43 Eliz. for the Poor Rates, &c. The Plaintiff was non-suited, but no Damages were found; therefore Counsel moved for a Writ of Error.

Chief Justice. I remember a Case, where, upon an Action of Detinue, and upon Issue Non Detinet, the Jury did not enquire of the Value, and afterwards we granted a Writ of Enquiry. It is every Day's Practice, that if the Plaintiff in Replevin be non-suited, the Jury shall find Damages and Costs for the Defendant.

Non-suited in Replevin; the Jury shall find Damage for the Avowant. See the following Case, and *post.* 118, 119.

Harcourt

Harcourt versus Weekes

WHICH was a Case of the same Nature with the for-
mer.

Holt, Chief Justice. *Who are of Opinion, That the Omission of the Jury to enquire of the Damages on a Nonsumt in Replevin, may be supplied by a Writ of Enquiry of Damages; it is true, the Jury might have been charged with the Damages, but that they were not, there was a Writ of Enquiry awarded.* 1 Cro. 143. Darroic and Newburt. In Assumpsit, the Plaintiff being at Issue, a Demurrer was joined upon the Count, and so the Jury was discharged; and after, Judgment was given for the Plaintiff, and a Writ of Enquiry awarded, and Damages found, and Judgment thereupon; and Damages might have been enquired of by the same Jury constitutionally, but it may be as well enquired of by a Writ of Enquiry, when the Demurrer is determined: And that comes home to this. 1 Rol. Rep. 272. Brampton's Case is the same with ours; so that it is no new Case.

Indeed, in the Case of Burton and Robinson in 1 Sid. 246. where in Detinue the Jury did omit to assert the Value of the Goods; the Court did doubt that a Writ could not be awarded, for that it would be against the whole Tenor and Reason of Cheney's Case.

But notwithstanding, I remember a Case about fourteen Years ago, where a Writ was awarded in such Case; so that I think a Writ of Enquiry ought to be awarded in this Case.

Johnson versus Adams and Others.

IN Replevin, for taking the Cattle, and several Stocks of the Plaintiff, &c.

Defendants plead, Bene cognoscunt captionem Averiorum & Catallorum in Loco præd' quia dicunt quod Averia præd' &c. But say nothing as to the Chattels; but they conclude, and pray Judgment Averiorum & Catallorum.

Curia. It is ill: For though they make Cognizance of the Whole, yet they do not answer the Whole; so that they are short in their Justification. If the Damages be entire, if it is wrong in Part, it is bad for the Whole.

Vide 1 Salk. 305, 306. And pag. 118. Omission of the Jury to enquire of Damages, supplied by a Writ of Enquiry. Cro. Car. 32, 33, 153, 449. 10 Co. 119. 1 Roll. Rep. 272, 284. 2 Roll. 212. 1 Cro. 143, 357, 446. Hard. 166. 1 Sid. 380. 1 Vent. 40. Raym. 170. 1 Lev. 255. 1 Salk. 205, 206. Raym. 124.

10 Co. 119.

Carth. 183, 186.

Cognizance of all, and Justification for Part. Comb. 346, 347.

Ann 13.

The Matter is, what Judgment we shall give, whether to abate the Writ, or that the Plaintiff shall recover and have Judgment final? Certainly it is ill, to acknowledge the taking of all, and to justify but for Part.

We will consider what Judgment to give.

Cudmore *versus* Tripe.

Skin. Rep.

131.

Infra Jurisdiction.

WRIT of Error on a Judgment given in the Probost Court at Exeter, where the Plaintiff declared in an Indebitatus Assumpsit, and also in a Quantum meruit: But in the Quantum meruit, doth not say, That the Cause of Action was infra Jurisdictionem Curie.

Carthew. If it had been omitted in the first Promise, I confess it had been ill; but I conceive, the infra Jurisdictionem in the Indebitatus Assumpsit goes to all.

Chief Justice. Indeed there wants the adunc & ibidem. Let Judgment be reversed.

S. C. 1 Salk.
347.

Roe, Kendale, and Others.

Power of Secretary of State to commit.

1 And. 297.

2 Leon. 275.

THEY being brought up by Habeas Corpus, it appeared by the Return, that they had been committed by Sir William Trumball, one of the Secretaries of State, for assisting Sir James Montgomery, (who was in Custody for high Treason) in his Escape.

Comb. 343,
344.

Sir B. Shower moved, That they might be discharged, their Commitment not being legal. First, Because a Secretary of State is no Justice of Peace; and as a Secretary of State, he cannot take a Recognisance to prosecute; and therefore it is strange he should have Power to commit.

It is true, since Sir Lionel Jenkins's Time, it has been practiced by the Secretaries of State to take Bond. I have look'd into Rushworth's Collections, and I cannot find one Precedent for a Secretary of State to commit any one.

It cannot be presumed, that Sir William Trumball was a Justice of Peace; for it appears that he was Secretary of State, and as such did make the Commitment: And truly, I cannot

see but he might as well commit for Murder or Felony, as for High Treason.

It is objected, That any Man may arrest another for Treason; and that is true, but then he must carry him to a Justice of the Peace, which we say the Secretary of State is not: But however, though we grant that a Secretary of State has Power to commit; yet, with Submission, in this Case they ought to be bailed, since they are within the Benefit of the Habeas Corpus Act. For the Commitment appears to be for the admitting the Escape of Sir James Montgomery, who was committed for High Treason, but was never outlawed nor indicted. And my Lord Chief Justice Hale is express, That the Gaoler shall not be arraigned for an Escape until the Prisoner be attaint; for if the Prisoner be acquit, the Escape is dispensable. Hale's Pleas of the Crown, fol. 110.

Gaoler not to be arraigned for an Escape, till the Prisoner be attaint.
Hawke. P. C. c. 19. §. 26.
Dalt. 331.
c. 459.

And here the Prisoner cannot be attaint, for he is dead; so that they only can be fined and imprisoned.

Then with Submission, to admit in the Escape of one committed for High Treason, is not Treason, unless the Party admitting knew that he was committed for High Treason: And if this Offence be but Felony, the Commitment is illegal, because it would have been too generally set forth. 2 Inst. 589. 3 Inst. 70. If a Prisoner broke Prison, it was Felony at Common Law, be the Cause what it will; but by Stat. 1 Ed. 2. De frangentibus Prisonam, none shall suffer Judgment of Life and Member, unless the Cause for which he is imprisoned require such Judgment: And I take it for a Rule, That whatever is not Felony on the Escape of a Felon, is not Treason upon the Escape of a Traitor.

2 Inst. 589.
591.
Cro. Jac. Benstead's Case.
1 Hale's P. C. 234, 590.
591.

Then here it is said, The Prisoner was in Custody of a Messenger; but what that is, we know not, there's no Book of Law that takes Notice of any such Person.

Then it does not appear what the Offence was, nor that any Treason was committed; so that we must throw ourselves up, on your Lordship's Justice, and hope, that for these Reasons your Lordship will think fit to discharge us quite, or else to bail us.

Attorney General answered, That these Commitments by Secretaries of State, had always been received to be good, and that their Office was more ancient than the Privy Council, and that it was clear the Privy Council could commit; and that though the Warrant be not so exact, yet it is sufficient, and it was not like an Indisment, for the Time and Place, and the particular

Commitment by Secretary of State.

particular fact need not be expressed in the Warrant, as they must be in Indiments.

Shower. Were the Prisoner being no Officer in Law, the Party in his Custody may bring false Imprisonment against him; and then to assist a Person to escape in such a Case, is no Fault at all, for it was to free him from one that had nothing to do with him.

How the Law
takes Notice
of a Mes-
senger.

1 Hale's P. C.
398, 399.
606, 607.
Hawk. P. C.
vol. 2. c. 21.
§. 7.
Skin. Rep.
396, 399.

Holt, Chief Justice. The Law indeed does not take Notice of a Messenger; but however, if a Man refuse another that is carrying to the Gaol by a Messenger, or any other Person, it is criminal.

Then why should not a Secretary of State have Power by Law to make Commitments? May what Authority has a Justice of Peace to commit in Cases of High Treason? It is not given to him by any Statute; and truly I cannot tell from whence he derives such an Authority, unless it be by Custom of the old Common Law, which does authorize Constables of the Peace to commit in such Cases.

Vide 6 Mod.
179.

My Lord Coke does seem to intimate, as if a Man could not be committed till he was indicted: But certainly that is a Mistake; for the constant Practice is otherwise.

But their strongest Objection seems to be, That the Nature of the Treason is not set forth; as whether it be for levying of War, or for compassing of Treason, or any other Species of Treason.

Attorney General. Let the Treason be what it will, of whatever Sort it is, to assist such a Person charged with it to escape, is Treason.

Chief Justice. Suppose the Treason were for Coining, &c. would it be Treason to assist such a Person to escape?

Dr. Attorney. The Question is, Whether this Man be charged with High Treason, as you have alledged it in the Warrant?

Rokeby, Justice. Does it appear to us, that this Warrant is not valid?

Holt, Chief Justice. I remember my Lord Chief Justice Hale, at Norwich Assizes, was of Opinion, That a Justice of Peace

Peace might direct a Sheriff to any Person to execute it, and in a Case that came before him there, the Sheriff was directed to the Constable of the Parish, to be executed in another Parish, which was done, and held to be good.

A Justice of Peace may direct a Warrant to any Man to execute.

At another Day this Matter was again debated.

Holt, Chief Justice. In Anderson's Case, the Privy Council was the Opinion of all the Judges, That the Privy Council, or any one of them, might commit, and retaining the Secretary of State is one of them.

Vide 1 And. 297. 2 Leon. 275.

Shower. As for that Resolution, it may well be suspected for Law, it was not judicial: And there have been Instances, where Judges have given different Resolutions under their hands, from those which they have given judicially when they acted under an Obligation of an Oath, and with submission, one of the Privy Council cannot commit, nor be called upon an Oath: And it seems against the Reason of our Constitution, That the same Officer should have Power to commit, and yet cannot administer an Oath, which I take to be necessary upon every Commitment: for my Lord Coke, in his 2 Inst. 51. says, That all Commitments must be upon Oath.

Commitment by one of the Privy Council.

Then it is very extraordinary, That an Officer shall have Power to commit, and yet he can neither administer an Oath, nor take a Recognizance to prosecute, nor take Bail, though his Judgment tells him, that the Offence is bailable: This seems very inconsistent.

These extraordinary Commitments are not favoured in our Law; and in the old Times, such Commitments were very seldom. Then 25 Ed. 3. cap. 4. is one of those Statutes that vindicates the Liberty of the Subject in respect of extrajudicial Commitments; for it is said there, none shall be apprehended upon suggestion to the King or his Council, unless by Indictment or Presentment, or by Process of the Common Law: And in 4 Car. 1. these general Commitments per Mandatum Domini Regis, were thought a great Oppression to the Subject. 16 Car. 1. c. 10. p. 8. My Lord Coke, in his 2 Inst. 52. says, That before Commitments there must be an Oath, which in this Case could not be: It is true, the whole Privy Council may commit upon Oath; but that one Privy Councilor may do so, I do not find any where. In Pryn's Animadversions on the 4th Institutes, there is a notable Record, when the Person was impeached by the Commons in Parliament, for a Riot and Assault on several Lords of the Council; from which I infer, they

The Cause of this Council would be for the Record. P. 7. 8.

they would not have any Recourse to the Legislature, but the Privy Council themselves such a Power to commit. I confess the Privy Council may cite; and so may the Ecclesiastical Court summon, but they cannot commit.

As to my other Exception in Inst. 705. It is said, That a new Gaol cannot be erected without an Act of Parliament; how then can the Houses of these Messengers be as many Prisons? I think there are forty-two Messengers, and if their Houses should be lawful Places of Confinement, there would be so many new Gaols or Prisons erected without Authority of Parliament, which ought not to be. 5 Ed. 3. No. 68. In the 12 Rep. 129. indeed a Messenger is mentioned; but nothing can be drawn from thence, that he can therefore keep a Prisoner.

Messengers
Skin. Rep.
199.

So that if Sir James Montgomery was not in legal Custody, the assisting of him to escape is no Fault; there are other Places of Confinement besides Messengers Houses, that they have been questioned whether they be Prisons or not, so it has been doubted, whether the Tower of London be a Prison, or not within the Habeas Corpus Act?

Chief Justice. The Tower is a Prison without Doubt.

Shower. My next Exception was, That the Warrant does not express what the Treason is, and there may be a Treason, the assisting of which is not Treason, as the Harboring of Jesuits, or Counterfeiters of Money, it is only a Disposition of Treason. My Inference is, That if Sir James Montgomery was charged with such a Treason, the assisting of which would not make me guilty of Treason, then my assisting him to escape is not Treason. 12 Rep. Dyer 296. 2.

Then if the Intendment be general, it shall be taken for the Liberty of the Subject, so is Vaughan 136, 137. where it also appears, That the Return to an Habeas Corpus ought to be certain; and so it was resolved in Bushell's Case, So that if it cannot appear to your Lordships to be Treason, with Submission, we ought to be bailed within the Habeas Corpus Act.

Levinz, Serjeant, Ad idem. If Sir James Montgomery himself were here, he must have been bailed, by Reason of the Uncertainty of the Crime expressed in the Warrant of Commitment: And shall we be in a worse Case than he himself would have been?

Then

Then Returns in all Cases ought to be particular, and certainly express the Cause. *Mo. 839.* There are several Cases of Prisoners committed and delivered per Habeas Corpus; and the Returns of the Officers having Custody of them in the Fleet, Tower, Gate-house, and all certain.

Then the Old Law is, That all Commitments shall be to the County Gaol. *Brit. 19, 92.* *Capt. Newwood's Case;* and the Statute of 5 H. 4. that Justices of Peace shall commit to the County Gaol, is but Declaratory of the Common Law; and a Messenger's House certainly is not the County Gaol: Indeed, a Man may be committed to a Messenger's Custody for twenty-four Hours, &c. while the Matter is under Examination.

There is a Case in 1 Leon. 170. where the Power of the Secretary of State is questioned, but I am loth to meddle with it; and I think we need not have made all this Stir about it, we only desire to be bailed.

It is plain, That the Warrant must be legal.

And my Lord Chief Justice Hale, in his Pleas of the Crown, 116. is as plain, That the Return shall not be attainted till the Principal be attainted: Then if it be true, that Sir James Montgomery is dead, it is morally impossible for these Persons ever to be attainted.

Attorney General. *Leon. 1. p. 70.* Habeas Corpus was directed to the Steward and Marshal of the Marshalsea for Howell, who made Return that the said Howell was committed to his Custody, per Mandatum Fran. Walsingham Militis, Principalis Secretarii, & unius de Privato Concilio Domini Regine, and that Return was by the Court held insufficient, because the Cause why he was committed was not set down in the Return; and there the Court took a Difference, where one is committed by one of the Privy Council, for in such Case the Cause of the committing ought to be set down in the Return; but where the Party is committed by the whole Council, there no Cause need to be alledged.

It is objected, That the Treason not being express'd, therefore the aiding and assisting of him cannot be Treason; for say they, This Treason might be for harbouring Jesuits, Counterfeits of Coin, &c. but the receiving of Jesuits, &c. is not an aiding and abetting of them: But with Submission, the assisting any of these Persons is Treason, though these Facts were made Treason by Act of Parliament.

Returns to be particular and certain.

Particular and certain.

Particular and certain.

The Cause of the Commitment to be set down in the Return.

Post. 85.

**On Trial of
the Accused,
the Attorneys
of the Principal
must be
produced**

3 Hale's P. C.

584
Hunt D C

HAWK. P. C.
vol. 2, p. 21.

§. 8. c. 29.

5. 2, 3, 13.

Commitments without an Oath.

Do not think it is not according to equity the Court say in the
 language of Commination, the Species of Treason is not di-
 rectly mentioned there; I am aware, that upon the Trial at the
 Assizes, there must be the Evidence of the Principal, & others;
 But here in Treason, all are Principals; and let them look to
 beware of that at the first. 116 116 D. 21 116 2 116 2 116 2

As for their Objection, That no Person shall be committed
but to the County Gaol, this is not so, for then no Man could
be committed in the Tower, One would say.

Indictor General. These Commitments in Cases of High Treason have lasted in all Times, sometimes for particular Fells have been executed, and sometimes not; and yet thought good either Way.

In for the Objection, That an Oath is necessary to be made before any Commitment; that need not be, there are many Cases where Persons may be committed without any Oath at all: So the House of Commons may commit, and yet they cannot administer an Oath! So a Constable may commit without any Oath. See page 32.

When as to the Objection concerning the Defendant, it is out of the Case; for though his House be no Gaol, yet the admitting of one to escape from thence, is as Criminal as if he had assisted to escape from the County Gaol. For being with the Defendant while he was under Condemnation, he was in the Custody of the Lords, and it is not the Breach of the Wall that is a Breach only of Prison; for as Bracton saith, To assist a Thief to escape that is going to be executed, is a Breach of Prison; so that he conceals the Condemned to be lawful, and that they ought not to be lawful.

Hark, Chief Justice. Indeed you might have asked the
 Question about the Secretary's Power to commit. It seems to
 have been made more for Dodge, than for Secretary. But in
 Anderson it is plainly resolved; and so it is in 1 Leon. 71. that
 he hath such Power.

“(For that matter) has always puzzled me in. Since Saturday there has been no activity at Common Law? This was started at Cook Delivery at Common Law while imprisoned a jury to enquire. On Monday (11th) 1967 - 1967 to 1967 was arrested in

As to the question about the Commitment to a Judge, surely the Party may be committed to him during Examination. Indeed I do take it, that generally the Commitments ought to be to the Common Gaol, especially since the Habeas Corpus

Palm. 558.
1 Sid. 78.
1 Salk. 347.
Hawk. P. C.
vol. 2. c. 16.
fol. 117.

As, that the Party may better take out an Habeas Corpus; tho' you will find in my Lord Chief Justice Hale's Pleas of the Crown, That the breaking of other Prisons is Felony. Now consider this, That if an Act of Parliament make an Offence Felony, and there is not one Word as to the Accessories, yet they shall be Felons; then why should not these Persons that are in the Nature of Accessories to Treason, be likewise guilty of Treason?

Hale's P. C.
601, 602,
607, 608.
Hawk. P. C.
vol. 2. c. 21.
§. 1, 2, 7.
c. 18. §. 16.

But Mr. Attorney, I very much doubt whether you ought not to have specified what Sort of Treason it was, and that he had committed it: As for the Purpose, if it had been for the conspiring the Death of the King, or for adhering to his Enemies, &c. then the assisting the Escape of such a Traitor comes under the same Species of Treason.

Then it is a great Doubt with me, Whether you should not aver that he did actually commit the Treason?

Attorney General. With Submission, it would be too much to say in the Warrant of High Treason, that the Party was guilty. Indeed, in the Indictment we must alledge it.

Chief Justice. I think it must be considered of, though I doubt very much as to the not specifying of the Treason, that the particular Sort ought to have been expressed in the Warrant.

Commitments
for Treason
should specify
the particular
Sort of Treas-
on.
Ante 83.
Hawk. P. C.
c. 17. §. 12.

Rokeby, Justice. Certainly a Conservator of the Peace at the Common Law might have committed, and to administer an Oath, is incident to his Office; so that I take it, that a Secretary of State is in Nature of a Conservator of the Peace, and may as well commit now, as the other could at Common Law: But indeed it seems to me, that they are bailable, because it is not expressed what Sort of Treason it was. As to the Messenger, I take him to be only a Carrier of the Party to Prison, and he is not in the Nature of a Gaoler.

Eyre, Justice. Upon the Whole, I think it reasonable that they should be bailed.

Chief Justice. Then let them be bailed.

Z

Young

S. C. 1 Bull.
627.

Young v. Rudd. Pasch. 7 Will. Rot. 78.

Pol. 136.

Indebitatus Assumpsit, and a Quantum Meruit.

Comb. 320,
321.

The Defendant pleads in Bar, that he gave the Plaintiff a Bag of Pot, which he accepted in Satisfaction of the Debt.

The Plaintiff replied by Protestation, that the Defendant did not give the Pot in Satisfaction: and traversed, that he did accept in Satisfaction: And upon Demurrer,

• 1 Rep. 117.
Mo. 677, 678.

It was objected in the Behalf of the Defendant, that this was an immaterial Traverser, because the Giving is the directing Matter, which ought to have been traversed, and not answered by Protestation. Like the Resolution in *Pynch's Case*, which was an Action of Debt on a Bond, of the Penalty of 16 l. for Payment of 8 l. on a certain Day. The Defendant pleaded, That before that Day, he at the Request of the Plaintiff paid him 5 l. which he accepted in full Satisfaction of the Debt; but because he pleaded the Payment of the 5 l. generally, and not in full Satisfaction of the whole Debt, the Plaintiff in that Case had Judgment.

4 Co. 117. b.

It was objected there, that the Manner of Tender and Payment shall be directed by him who makes it, and not by him who receives it: and that it is not material, how the Person to whom the Thing is given accepts it: For if it is accepted, it must be as the Giver intended it; and therefore the Plaintiff ought to have traversed the Giving in Satisfaction, for that is the most material Part of the Plea, and ought to have been put in Issue: It is true, if it had been after a Verdict, the Giving and Acceptance might have been taken to be reciprocal Acts, (viz.) that the one would not have been accepted, unless the other had given it in Satisfaction: But upon a Demurrer it is otherwise.

9 Co. 20. b.
Str. 263. 239.
Witch. 78.
Cro. Eliz. 68.
109. 110.
2 Brownl.
107.

And there it was held, that the Manner of Tender and Payment shall be directed by him who makes it, and not by him who receives it: and that it is not material, how the Person to whom the Thing is given accepts it: For if it is accepted, it must be as the Giver intended it; and therefore the Plaintiff ought to have traversed the Giving in Satisfaction, for that is the most material Part of the Plea, and ought to have been put in Issue: It is true, if it had been after a Verdict, the Giving and Acceptance might have been taken to be reciprocal Acts, (viz.) that the one would not have been accepted, unless the other had given it in Satisfaction: But upon a Demurrer it is otherwise.

Str. 239.

Contra, for the Plaintiff. Either the Giving or the Acceptance of what is given in Satisfaction, may be traversed; this was the Opinion of my Lord Rolle, though he held it more proper to take Issue upon the Payment: But if the Acceptance in Satisfaction is traversed, there will be no Question of answering the Giving.

1 Yel. 192.
1 Brownl.
109.
1 Bull. 66.
2 Cro. 254.

It is a Rule in Philosophy, that Quicquid recipitur est ad modum recipientis; and there are Instances in Law to this Purpose, as in an Action of Debt upon a Bond. The Defendant pleaded, That whereas the Plaintiff was indebted to him for a Load of Lime, it was agreed between them, that the Defendant should

Should receive him of the Land, and yet the Plaintiff should accept it in Satisfaction of the Bond, and so on; that he did accept it in Satisfaction of the Bond; and upon Demurrer to this Plea, it was held (11) That before the Defendant had pleaded the Acceptance only, and not the Giving in Satisfaction; but he could be compelled to have pleaded the Acceptance in Satisfaction of the Bond mentioned in the Condition of the Bond; and not of the Bond generally, for that could not be discharged without a Specialty.

Curia. Where a Thing is pleaded by Way of Concord, it is a Plea; but if the Concord is not executed by giving and receiving, it cannot be pleaded in Bar to the Action: Therefore the best Way of pleading it, is by setting forth, that the Thing was given and received in the full Satisfaction, &c. according to the Resolution in Pinnell's Case; but both are traversable.

As for Instance, the Condition of a Bond was, That if the Defendant compounded with our Earle for his Lands, then he should pay the Plaintiff 3000 Marks.

In an Action of Debt brought on this Bond, the Defendant pleaded, That he had not made any Composition with Earle; &c. the Plaintiff replied, That Earle did grant a Release in Fee to the Defendant, in Satisfaction of his Title; and so he made a Composition. The Defendant protested, that Earle non concessit pro placito dicto; he did not accept it in Satisfaction; and it was adjudged a good Plea, without traversing the Grant: For as in that Case, there could not be any Composition without the Consent of the Parties; which depended purely upon the Acceptance, which the Defendant denied to be in Satisfaction of his Title: So in this Case, the Denial of the Acceptance implies, that the Thing was not given in Satisfaction; and therefore Judgment was given for the Plaintiff.

Smith versus Crompton.

IN an Action on the Case for negligently keeping his Fire, whereby the Plaintiff's House was burnt; there was a doubtful Evidence given at the Trial before the Chief Justice as the Jury, and the Jury gave a Verdict for the Defendant.

S. C. 2 Salk.
644.

Vide post. 181.
Carth. 207,
425.

Vide 2 Salk.

644, 645,

645, 648,

800.

© Salk. 49, 50.

Part 1. Mod.

Ca. in Law

and Equity,

220, 264.

Fitzgib. Rep.

40.

Ca. in Law

and Equity,

202, 203.

Carth. 498,

499.

Vide 2 Salk.

647, 649.

It was moved several Times for a new Trial, because the Evidence was very doubtful, upon which the Verdict was given against the Plaintiff, and it was insisted on his Behalf, that though it is true, that in an Information of Perjury, where the Defendant was found guilty, the Court would not grant a new Trial, though it appeared there was no Reason for such a Verdict, unless the King's Counsel would consent to it; yet in an Action of Debt brought by an Informer, and a Verdict for the Defendant, the Court may grant a new Trial, because the Party hath an Interest; and this is the Difference taken in the Books.

It might be a Thing of ill Consequence, if it should not be in the Power of the Court to grant new Trials in Cases where there are apparent Reasons for so doing; as where excessive Damages are given for Wrongs, or where two Verdicts have been given against one Defendant, and in many other Cases.

But on the other Side it was said, that no new Trial could be granted in this Case, though the Court should see any Reason for it: And the Case of Sir John Jackson was chiefly relied on, who was discharged of a great Debt at the Assizes in Cumberland, by the Perjury of Fenwick and Holt, who being indicted for the same Crime, Sir John procured the Witnesses to be arrested, who could prove the Perjury, so that they could not come to the Assizes to give Evidence, and thereupon Fenwick and Holt were acquitted: And tho' this Practice did appear plainly upon several Affidavits, yet the Court would not grant a new Trial, but ordered an Information against Sir John Jackson; upon which he was found guilty, and fined 1000 Marks.

Afterwards a new Trial was denied in the principal Case.

Plummer *versus* Lea.

Bankrupts.

Vide 1 Salk.

108, 109,

111.

6 Mod. 203.

2 Jo. 203.

ONE Alexander Holt recovered a Judgment Anno 17 Car. 2. against the Defendant, and had a Testatum Sci' Fac' to the Creditors.

They appear and plead, and there was a Verdict against them at the Assizes in Suffolk, and Judgment thereupon.

Afterwards Holt became a Bankrupt, and the Commissioners assigned the original Judgment to Plummer, who now moved the Court, that it might be entered to entitle him to the Benefit of the Judgment upon the Sci' Fac' which was ruled accordingly, without bringing a new Sci' Fac' quod nota.

D E

Term. Sanctæ Trin.

Anno 7 W. 3. Regis B. R. 1695.

Dalston, Bar. versus Janson.

Vide 2 Salp
703.

Lond' ff. **J**ohannes Dalston Miles & Baronnetus queritur de Joshua Janson, communi portatore in custodia Mar' Maref. Dom' Regis coram ipso Rege existen' pro eo videlicet quod cum præd' Joshua decimo sexto die Martii Anno Dom' 1693. & diu antea & semper postea fuit & hucusque existit Communis Portator [Anglice Carrier] bonorum & cattallorum & pro ejus proficuo bona & catalla quarumcunque personarum hujusmodi cariacon' requirend' a Wakefield, in com' Ebor' usque ad London, & a London præd' usque ad Wakefield, præd' per totum idem tempus pro mercede proinde habend' portare & carriare consueverit, cumque per legem & consuetudinem hujus Reg' Angliæ quilibet communis portator bonorum & cattallorum qui bona & catalla alicujus personæ recipit sic portan' eadem absque subtractione & amissione custodire & portare te-

netur ita quod in defectu talis communis portator' seu servien' sui damnum non eveniat ullo modo, cumque idem Johannes eodem decimo sexto die Martii Anno Dom' 1693. supradict' apud Lond' præd' videlicet in paroch' beate Mariæ de Arcubus in Warda de Cheap possession' fuit de bonis & cattallis sequen', viz. de una pixide abiogna [Anglice a Deal Box] & centum peciis Cynat' auri, vocat' Guineas, Legalis monetæ Angliæ, ut de bonis & cattallis suis propriis, & præd' Johannes sic inde possessionat' existen' eodem decimo sexto die Martii Anno Dom' 1693. supradict' apud London præd' videlicet in Paroch' & Warda præd' pixidem præd' cum præd' centum peciis auri Cynat' in eadem existen' præfat' Joshuæ ad eundem a London, præd' usque ad Wakefield præd' in com' Eborum pro mercede salvo & secure carriand' & ibidem idem Johannes deliberavit præd' Joshuæ præd' pixidem & præd' centum pecias auri Cynat' in

A a

Trover, 2.
Nar.

in eadem existen' adtunc & ibidem ad portand' & deliberand' in forma præd' recepit & habuit præd' tamen Joshua ad aliquod tempus postea hucusque pignorem præd' cum præd' centum pecuniis Cunit' in eadem existen' eidem Johanni non deliberavit sed pignus præd' & præd' centum pecuniis Cunit' in eadem existen' postea, scilicet decimo septimo die Martii Anno Dom' 1693. supradicto, apud London præd' in Paroch' & Warda præd' huiusmodi boni custod' ipsius Joshue perdit' & antissa huiusmodi. Cumque etiam præd' decimo sexto die Martii Anno Dom' 1693. supradicto apud London præd' videlicet in Paroch' & Warda præd' præd' Johannes posses. fuit de aliis bonis & catallis sequen' videlicet de una pignus abiegnis [Anglice a Deal Box] & centum pecuniis Cunit' auri, vocat' Cunitas, legalis moneta Anglie, ut de bonis & catallis suis propriis, & sic inde possessionem existens idem Johannes postea, scilicet eodem decimo sexto die Martii Anno Dom' 1693. supradicto apud London præd'

in Paroch' & Warda præd' bona & catalla ill' extra manus & possession' suas casualiter perdidit & amisit quæ quidem bona & catalla postea, scilicet eodem decimo sexto die Martii Anno Dom' 1693. supradicto, in Paroch' & Warda præd' ad manus & possession' præd' Joshue per inventionem deveniunt præd' tamen Joshua sciens bona & catalla præd' ultima præd' fore bona & catalla præd' Johannis propria & ad ipsam Johannem de jure spectare & pertinere machinan' tamen & fraudulenter intendit præd' Johannem in hac parte callide & subdole, decipere & defraudare bona & catalla ult' mentionat' præd' eidem Johanni licet sapius requisit, &c. nondum deliberavit sed bona & catalla ult' mentionat' postea, scilicet decimo septimo die Martii Anno Dom' 1693. supradicto apud London præd' in Paroch' & Warda præd' ad usum & commodum præd' Joshue proprium convertit & disposuit ad dampnum ipsius Johannis 150 l. & inde producit sectam, &c.

Non cul' Judicium pro Quer.

3. C. 1 Salk.
10.
Vide 2 Salk.
703.
The Pleadings.
1 Vent. 365.
1 Sid. 244.

Comb. 63.
333, 334.
1 Roll. Abr.
6.

Dalton versus Janson.

THIS was an action on the Case brought against a Common Carrier upon the Custom, and also a Trover was laid in the same Declaration.

Upon Not guilty pleaded, there was a Verdict for the Plaintiff, and it was moved in arrest of Judgment.

It was shewn that these were different actions, and ought not to be joyned in one and the same Declaration, for one is grounded upon a Contract in Law, in which Non Assumpsit is the proper Plea, and the other upon a Tort, and it is for the same Reason that a Trover and an Indebitatus Assumpsit ought not to be joyned, nor an Ejectment,

Ejectment, and an **Affidavit** on the Case for **Scandalous Words**, though the same Issue grows to both.

But that **guilty** is not the proper Issue to this Action, for evidently the Defendant pleaded specially to the Neglect and Offence.

It cannot be denied but that this Action is founded on the Contract, and for that, the Authority of the Case between **Bos** and **Sandford** is plain.

An **Ejectment** and an **Action** for an **Assault** and **Battery** were joined, and the Plaintiff had a **Verdict**, but the Court was of Opinion that this was the first Precedent, for they order in **Damages**, and therefore they added on it; but Justice **Winch** was of Opinion that it was not good.

To which it was answered, That it was my Lord **Hobart's** Opinion in that very Case, that the Declaration was good after a **Verdict**; and that of late no Action had been brought against a **Common Carrier**, but **Trover** was joined with it.

An **Action** on the Case for **over-riding**, and **not delivering** an **Hay** according to a **Contract**; and also for a **Conversion** to the Defendant's Use were joined together. Upon that **guilty** pleaded, the Plaintiff had **Judgment**, though he might have demurred to the Declaration, it being double, but by pleading the general Issue, and that being found against him, it made the Declaration good.

So **Trespas** for **beating his Servant**, per quod **Servitium amittit**, and an **Action** on the Case for **keeping a Dog** accustomed to bite **Sheep**, were joined for one Declaration, and the Plaintiff had **Judgment**; though it may be a Question whether **Trespas** will lie for the loss or not, for it is only a Negligence to let the Dog loose, for which **Trespas** will not lie.

It is not the Contract which entitles the Plaintiff in this Case, for it is an Action grounded upon a **Tort**, and the Time and Judgment are the same in both.

It is true, there was the like Declaration, **Issue** and **Verdict**, in the Case of **Matthew** and **Hopkins**, and the Judgment was arrested, not for the Reason now given, but because the Plaintiff had alledged, that the Defendant was a **Carrier** on the 10th of **May**, and that he was possessed of the Goods on the 6th of **May**, on which Day he did deliver them, so that it did not appear he was a **Carrier** on the Day of the Delivery.

These are not Actions of different Natures, and therefore they may be join'd: And the like hath been done in many other Cases, as **Debt** upon **Bond**, and **Detinue** were join'd; so likewise **Debt** upon a penal Statute, and an **Indebitatus Assumpsit** generally for

Cities

show. 29.
Mod. 321.
3 Lev. 258.
2 Salk. 440.
Bird ver.
Snell, Hob.
249.
1 Brownl.

For the
Plaintiff.
White ver.
Residen.
Cry. Car. 20.

Ash ver. Ra-
pier, Pasch.
26 Car. 2.

1 Sid. 294.
1 Vent. 365.
1 Keb. 870.

Fitz. Title
Brief 283.
3 H. 4. 13.
1r. Joinder
in Action, 97.

Wright *ver.*
Beale,
1 Sid. 223.
1 Lev. 141.

8 Rep. 86.

Mod. Cases in
Law and E-
quity, 370.
Fitzgib. 85.
Skin. Rep. 66.
Cases in Law
and Equity,
171, 172,
210.
Comb. 47.
114, 115.
Carttew 113.
Hob. 17.
Hard. 163.
Cro. Jac. 262.
263, 330.
Palm. 523.
Hern's Pleader
76, 77.
1 Sid. 36.
Bro. Action
upon the Case,
78.
4 Rep. 84.
Owen 57.
2 Sand. 380.
2 Mod. 270.
Moor 462.
Pla. 650.
Co. Lit. 89.
3 Mod. 323.
Molloy 209,
210.
1 Keb. 852.
870.
Hob. 245.
1 Sid. 245.

Ante 75.

Cities and Non Assumpsit pleaded to both, which was a Discon-
tinuance to so much as related to the Penalty; but it was the
Opinion of Justice Twisden, That if the Issue could have been
Not guilty, it might have gone to both.

Agreeable to this is that Distinction taken in Buckmere's Case,
that in Actions real founded upon a Tort, a Person shall have but
one Writ to recover Lands, to which he has several Titles; but
in personal Actions, several Torts may be comprehended in one
Declaration, because in these there is not so much Regard to
Forms as in the other.

Before the Statute de Bonis Asportatis in vita Testatoris, it
was a Question, Whether an Action would lie against the Exe-
cutor of a Carrier? But now it is not doubted.

Curia ff. A Plaintiff cannot join two Actions which required
several Issues; so that the Question now is, Whether Actions
may be joined where the same Pleading will answer both?

In such Cases as this, the Defendant in former Times did
plead particularly to the Neglect; but it has been lately ruled,
that Not guilty is a good Plea.

But it seems strange, that Debt and Detinue should be joined,
because those Actions have different Judgments.

Upon the first Debate of this Case, they inclined for the
Plaintiff; but afterwards, when Justice Rokeby came into the
Court in Michaelmas Term following, they were all of Opinion
that these were distinct Actions; for an Action against a Common
Carrier, upon the Custom of England, is not so much upon a
Tort, as upon a Contract, for by receiving the Goods, and tak-
ing a Reward for the Carriage, the Defendant implicitly un-
dertaketh to deliver them safely, and therefore the Law implies
a Contract to answer the Master, if robbed.

The Case of Matthew and Hopkins the Carrier of Tiverton,
was upon the common Custom of the Realm, for negligently
carrying a Bag of Wool, in which there was 50*l.* and in the
same Declaration, there was a Trover for the said Money; and
it was held, that these were different Actions, and ought not to
be joined, which is the Case in Point, so Judgment was given
for the Defendant.

Alice Masters, *Admin'x* of Charles Masters, *ver.* Lewes.

In *Debitatus* Assumpsit against Lewes, and upon Non Assumpsit
pleaded, the Cause was tried before the Chief Justice of B. R.
in Guildhall, London, and it was given in Evidence,

ff. That

It. That Masters was indebted to Gosfright, and Lewis was indebted to Masters, who died before the Statute.

That the Defendant, after the Death of Masters, received 250 l. out of the said Goods for his Legue, as Executor of a Will, and before any Administration was granted to the Plaintiff, (for that was granted by Gosfright) he took a Writ against the Archbishop of Canterbury, as Ordinary, for the Debt due to him. There was a Nihil returned in the Sheriff's Court of London, and upon four Summons there was a Sci. Fac. and Judgment against him, and the Money of the Ordinary was received in the Defendant's Hands, which was afterwards redemitted and received by Gosfright: Then Administration was granted to the Plaintiff, who brought this Writ against Lewis, and had Judgment to recover. But whether the Debt in Law was a good Bar to her Action, it was referred to the Opinion of the Court by the Chief Justice himself, to whom it was referred at the Trial.

It was argued, that such an Attachment was well warranted by the Custom of London for about 150 Years, that there had been no Writ of Error in all that Time brought upon any such Judgment, neither was there any Precedent to the contrary.

The Objections against it are,

First, That by this Means the Administrator will be liable to a Devastavit.

Secondly, That no such Action will lie in the Sheriff's Court against the Ordinary.

As to the first Objection, this can be no Devastavit in the Administrator; for if he is such, he may plead plevn Administravit, which will be good, especially in this Case, where no Goods came to his Possession.

Then as to the second Objection, by the Statute W. 2. c. 19. the Ordinary was liable for any Debt so long as he had Goods in his Hands, which Act was made in Affirmance of the Common Law. Now till Administration was granted, the Ordinary both represent the Person of the Intestate.

There are many Customs in London, which are allowed there, and in no other Place, as arresting before a Debt is due, &c. and they are the proper Judges of their own Customs; and this Court will presume that they have acted according to Custom, unless the contrary appears.

So in London, an Executor shall be charged to pay a Debt upon a simple Contract of his Testator; and this was held a reasonable Custom.

Foreign Attachments.
Vide 1 Salk.
280, 291.

2 Inst. 397.

Ante 71.
Calh. 27.

Rep. 82.
Cro. Eliz. 409.
Snelling's
Case.

The Authority which comes nearest to this Case, is in Dyer ^{Dyer 247. 2. 1} 247. where one Toft was indebted to Foxcroft, and Wilkinson ^{Pl. 73.} was indebted to Toft, who died Intestate. The Ordinary granted Administration to Marshall; then Foxcroft levies a Plaint in London against the Ordinary, and upon a Nihil recovered, as in this Case, the Money was attached in the Hands of Wilkinson, and recovered and paid to Foxcroft, and the Administrator brought an Action of Debt for it.

The Defendant pleaded the Custom of Foreign Attachments in London, and all the Matter before-mentioned, and upon Demurrer to the Plea, the Plaintiff had Judgment.

Now though Administration was granted in that Case before the Plaint levied against the Ordinary, which was not in this Case, yet the Reason of that Judgment may govern this Case: Because the Ordinary can have no Action against Wilkinson the Garnishee, to recover the Debt due to the Intestate; therefore no Action should lie against him; so in this Case, because the Ordinary cannot sue, it is unreasonable he should be sued, and the Custom will not extend to make him liable to such Suit.

Curia. The Reason why Money is attached in the Hands of the Garnishee, is to make the Debtor appear.

Now the Defendant Lewes was never indebted to the Ordinary; therefore he could not be compelled to appear, by entering a Plaint against the Archbishop, to whom there was nothing due.

There are several Customs in London against Law, as arresting the Bail without a Sci' Fac' or Capias against the Principal, &c.

But this Custom cannot be supported by Reason; and though these Customs are confirmed by Act of Parliament, yet such Customs which are contradictory to Reason, and to the Principles of the Common Law, shall not be allowed in B. R. Afterwards in Michaelmas Term following it was held, that no Action did lie against the Archbishop, and by consequence the Plaintiff in this Case had Judgment.

Wilson versus Guttery.

THE Defendant was arrested on a Sunday, by Writ out of the Marshalsea, and now the Court was moved to discharge him; but it was denied, and he was directed to bring an Action of False Imprisonment.

Rex

6 Mod. 96.
1 Salk. 78.

Rex versus Harper.

Vide 1 Mod.
13.
Comb. 416.
1 Salk. 175,
380, 381.
2 Keb. 557.
6 Mod. 96.
Poph. 179.
Aley. 78.

A Motion was made to quash the Indictment, which set forth, That the Defendant being qualified to be a Constable, was taken into the Peace to serve that Office at Kingston; and that he had Notice of it, but did not take the Oath as required that Office.

The Objection was, That the Indictment should set forth, that he was chose by any who had sufficient Authority, and that he was sworn before a Justice of Peace to take the Oath; but it just appearing both he was chosen, and that he had Notice, therefore the Indictment ought to be quashed.

Nota. I have may set a fine on a Constable, but the Sessions cannot.

Poph. 127.
8 Co. 38. b.
11 Co. 43. b.
2 Rol. Rep. 3.
1 Salk. 175.

Swales versus Lowther.

Vide Cro.
Eliz. 446,
475, 702.
F.N.B. 53. G.
1 Rol. 645,
660.
Comb. 403.
Fitzgib. 298.
Skin. Rep. 560,
561.
Carth. 392,
393.

A Man had a House and a great Farm of Arable Land in the Parish of Kippax, where he dwelt, and he had five Acres of Meadow Land, and forty Acres of Pasture, in the Parish of Spillington, upon which Pasture he had his Cattle which were employed in Husbandry in the Parish of Kippax. The Parson of Spillington desired for Tithes, for the Agreement of Cattle there.

Thereupon the Defendant suggests, that by the Custom of England, no Tithes ought to be paid for Agreement of Cattle that are Ploughed or Pastured.

And a Prohibition was made for a Prohibition, because the Plaintiff cannot tithe for the Agreement of Cattle, but for such as are fed in the same Parish, and not elsewhere: And the Pasturage of Cattle used for Husbandry in the same Parish is not tithable, because the Parson hath Tithes for them in another Kind.

On the other Side it was said, That the Parson is to have a Profit where the Parsonage hath any Benefit, and that he is an Inhabitant where-ever he hath Land.

The Court would not grant a Prohibition upon the first Motion, but gave the Defendant leave to amend his Suggestion, by moving, that he had Arable Land in Spillington, and did exercise Husbandry there, which was granted.

Cro. Eliz. 702.
Moore 910.

After.

Afterwards, in Michaelmas Term it was moved again, and the Court were of Opinion, That if the Cattle depastured were not for ploughing the Land in the same Parish where they are fed, he shall pay Tithes, though they plough in another Parish; and if he had more Cattle than he employed for the Plough in the same Parish, he ought to pay Tithes for them; but ordered the Defendant to make Affidavit to ascertain the fact.

Carthew 476,
477.

Brockwell *versus* Lock.

DEBT by the Bailiff of the Palace-Court of the Bishop of Rochester for Fees, upon Execution of a Judgment in that Court, being 12 d. per Pound for any Sum under 100 l. and 6 d. per Pound if above that Sum; and this is by Vertue of the Statute 29 Eliz. in which there is a Proviso, That it shall not extend to Fees taken or had within a City or Town-Corporate.

Vol. 1 Mod.
167.
4 *Mod.* 254,
255.
2 *Rol. Rep.* 59.
3 *Leon.* 258.
29 *Eliz. c. 4.*
1 *Salk.* 209,
331, 332,
333.

The Plaintiff had a Verdict; and upon a Motion in Arrest of Judgment, because of that Clause in the Statute, it was alleged that this Case was not within that Proviso, it being neither a City or Town-Corporate where the Execution was made.

Now the Reason why Execution Fees are not to be taken in such Places is, because the Jurisdiction is narrow, the Sheriff is at less Trouble, and not so much in Danger of an Escape; but here the Jurisdiction of the Bishop is as large as his Diocese, and so not within the like Reason.

Cases in Law
and *Equiry*,
85, 86.
Skin. Rep.
363.

Bailiffs of Franchises and Liberties are named in the Statute, and the Plaintiff being such, and the Place not within the Proviso, he is entitled to this Action; and it hath been ruled, That where a Bailiff of a Franchise made Execution upon a Sci. Fa. he should have his Fees by Vertue of this Statute.

Comber. 220.

Curia. An Officer of a Liberty shall have his Fees for executing the Process of this Court; but it was never intended by the Statute, that he should have any for executing Judgments obtained in Inferior Courts; therefore this Judgment was stayed.

C. c. South

South versus Allen.

S. C. 1 Salk.
228.
Vide post. 101.

De Termino Sancte Trinitatis, Anno 7 Will. III.

Surr. fl. **M**emorandum quod alias scilicet Termino Pasche Ann. 1^o Dom. Regis nunc coram eodem Dom. Reg. nunc apud Westm. ven. Willielmus South per Thomam Johnson sen. Attorn. suum & protulit hic in Curia dicti Domini Regis tunc ibidem quandam billam suam versus Robertum Allen & Johannem Willson in Custod. Marefcal. &c. de placito transgr. & ejectionis firmæ, & sunt plegii de proseguendo scilicet Johan. Doe & Richard. Roe quæ quidem billa sequitur in hæc verba scilicet: Surr. scilicet Willielmo South queritur de Roberto Allen & Johannem Willson in Custod. Marefcal. Dom. Regis coram ipso Rege existen. pro eo videlicet quod cum quidam Willielmus Birch & Sara uxor ejus, primo die Maii, Anno Reg. Dom. Jacobi Secundi nunc, Regis Angliæ, &c. primo, apud Tooting Graveney in Com. præd. per quendam indenturam suam manibus & sigillis suis sigillis dimiserunt, concesserunt, & ad firmam tradiderunt prædicto Willielmo South unum Messuagium cum pertin. & unum horreum & unum Pomarium & unum Gardinum scituat. jacen. & existen. in Tooting-Graveney præd. in Com. præd. habend. & tenend. ten'ta præd. cum per-

tin. præfat. Willielmo South & Assign. suis & præd. primo die Maii usque plen. finem & terminum quinque Annorum extunc præd. sequen. & plenar. complend. & finiend. virtute cujus dimissionis idem Willielmus South in ten'ta præd. cum pertin. intravit & fuit inde possessionat. quousq. præd. Johannes Willson & Robertus postea scilicet Secundo die ejusd. Mensis Maii Anno primop. supradicto Vi & Armis in ten'ta præd. cum pertin. ib. & super possession. ipsius Willielmi South inde intraver. & ipsam Willielmum a firma sua præd. Termino sub præd. nondum facto ejectorunt expul. & amoverunt ipsam Willielmum a possessione inde extractor. & adhuc extrahunt & alia enormia ei intulerunt contra pacem dicti Domini Regis nunc ad dampnum ipsius Willielmi South centum libras & inde produc. sectam, &c. &c.

Et modo ad hunc idem scilicet diem Lune. prox. post Oculi Sancti Michaelis in eodem Termin. assign. quæ dicta præd. Robertus & Johannes habuerunt licentiam ad billam præd. interloquend. & tunc ad respondend. &c. coram Dom. Rege apud Westm. ven. tam præd. Willielmus South per Attorn. suum quam præd. Robertus Allen & Johannes Willson

per Edwardum Shaller Attorn.
suum & idem Robertus & Johan-
nis defend. vim & injur. quando,
&c. Et dicunt quod ipse nec eo-
rum alter est inde culpabilis mo-
do & forma prout præd. Williel-
mus South superius narrando al-
legavit & de hoc pon. se super
Patriam & præd. Willielm. South
inde similiter, &c. Ideo ven. in-
de jur. coram Dom. Rege apud
Westm. die Sabbati prox. post
Ostia. Pur. Beate Mariæ &
qui nec, &c. ad recogn., &c.
quia tam, &c. idem dies dat.
est partibus præd. ibidem, &c.
postea continuat. inde proces. in-
ter partes præd. de placito præd.
per Jur. posit. inde inter eos in
respectu coram Dom. Rege apud
Westm. usq. diem Mercurii prox.
post quinden. Pasche extunc
prox. sequen. nisi Justic. Dom.
Regis ad Assisas in Com. præd.
capiend. Assign. prius die Jovis,
tertio die Martii, apud South-
wark in Com. præd. per formam
Statuti, &c. ven. pro defectu
Jur. &c. ad quem diem coram
Dom. Rege apud Westm. ven.
partes præd. per Attorn. suos,
& præfat. Justic. Dom. Regis co-
ram quibus, &c. nisi hic recor-
dum suum coram eis habet. in
hæc verba, scilicet, postea die &
loco infrascripti coram Edw.
Herbert Milite Capital. Justic.
Dom. Regis ad placito coram
ipso Rege tenend. Assign. &
Thoma Jennour Mil. un. Baron.
Seaccarii dicti Dom. Regis ad
Assisas in Com. Surrey capiend.
Assign. per formam Statuti, &c.
ven. tam infrascripti Will. South

quam infrascript. Robertus Allen
& Johannes Wilson per Attorn.
suos infrascripti. & Jur. jurat.
unde infra fit mentio exact. simi-
liter ven. qui ad veritatem de in-
frascripti. dicend. electi sunt. &
jurat. dicunt super factum suum
quod diu ante infrascript. temp.
quo transgressio & ejectio infra-
mentionat. interius fieri supponi-
tur quidam Johannes Stone fuit
se it in dominie. suo ut de feodo
de & in infrascript. uno Messu-
gio, uno Horreo, uno Pomar. &
uno Gardin. cum pertin. scituat.
jacen. & existen. in Tooting-Gr-
veney infrascript. in Com. præd.
ac quod præd. Johannes Stone
sic ut præfertur de & in ten'is
præd. cum pertin. se it existen.
postea & antea præd. tempus
quo, &c. scilicet 29 die Octobris
Anno Regni Dom. Caroli II. nu-
per Regis Angliæ, &c. 33^o con-
didit Testament. & ult. voluntat.
suam in scriptis signat. sigillat. &
publicat. per prædict. Johannem
Stone in præsentia trium credi-
bilium Testium quorum nomina
eidem ult. voluntat. & Testamen.
& in præsentia ipsius Testatoris
per eosdem Testes subscript. sunt
in his Anglicanis verbis sequen',
(Viz.) *The Twenty-ninth of
October 1691, John Stone of
the Parish of Alhallows Berking,
London, Citizen and Mer-
chant-Caylor of London being
sick and ill, makes his Will
as follows: As to my Estate,
I give and dispose the same in
Manner following: Item, I
give unto my Sister Sarah
Birch, Wife of William Birch,
the*

the Rents and Profits of all my Lands and Tenements lying in Tooting in the County of Surrey, during her natural Life, and to be paid by my Executors hereafter named, into her own Hands, without the intermeddling of her Husband, and after the Decease of my said Sister Sarah Birch, I do give and bequeath the said Lands and Tenements, with the Appurtenances unto and amongst John Birch, Malme Birch, and Sarah Birch, Children of my said Sister, and to their Heirs and Assigns for Ever equally, Part and Part alike. Prout per eandem ult. voluntatem & Testum præd. Johannis Stone præfat. Justic. & Jur. præd. modo hic osten. prolat. lect. & in Evidentiam dat. (inter alia) liquet & apparet. Et Jur. præd. ulterius dic. super factum suum præd. quod præd. Johannes Stone postea scilicet primo die Maii, Anno Dom. 1682. apud Tooting-Graveney præd. in Com. Surrey præd. obiit sic inde seisit de & in ten'tis præd. cum pertin. & Jur. præd. ulterius dicunt super factum suum præd. quod infra nominat. Sara un. lessor. Quer. & Ux. Will. Birch alterius lessor. quer. in narration. præd. nominat. & Sara Birch in ult. voluntate & Test'o præd. Johannis Stone præd. similiter nominat. sunt una & eadem Persona & non al. neque diversa quodq; ten'ta in narration. præd. mentionat. & ter. & ten'ta in Tooting in Com. Sur. in ult. volunt. præd. mentionat. sunt

un. & eadem ter. & ten'ta & non alia neq; diversa quodq; eadem Sara Birch in plena vita modo existit & Jur. præd. super factum suum præd. ulterius dicunt quod præd. Willielm. Birch & Sara Ux. ejus postea & post mortem præfat. Johannis Stone & ante præd. tempus quo, &c. scilicet 30 die Aprilis, Anno Regni Dom. n'ri Jacobi II. nunc Regis Anglia, &c. primo, in ten'ta præd. cum pertin. in nar. & ult. voluntat. præd. mentionat. in & super Possession. præd. Roberti Allen & Johannis Wilson inde intraver. & fuer. inde se'it. prout lex postulat quodque præd. Willielmus Birch & Sara Uxor ejus sic inde se'it existit, postea scilicet infra script. primo die Maii, Anno primo infra script. apud Tooting-Graveney præd. in Com. præd. per Indenturam suam infra specificat. manibus & sigillis suis sigillat. dimiser. præfat. Willielmo South ten'ta præd. cum pertin. habend. & tenend. ten'ta præd. cum pertin. præfat. Willielmo South & Assign' suis a præd. primo die Maii, Anno primo supradict. usque plenum finem quinq; Annorum extunc prox. sequen. & plenar. complen. & finien. virtute cujus quidem dimission. idem Will. South in ten'ta præd. cum pertin. intravit & fuit inde possessionat. quousque præd. Robertus Allen & Johannes Wilson postea scilicet secundo die ejusdem Mensis Maii Anno primo supradict. Vi & Armis, &c. in ten'ta præd. cum pertin. in & super possession. ipsius Willielmi South inde intraver.

ver. & ipsum a firma sua præd. eiecer. sed utrum super totam materiam præd. per Jur. præd. in forma præd. compert. præd. Robertus Allen & Johannes sunt culpabiles de transgr. & ejectione infra script. modo & forma prout præd. Willielmus South interius versus eos queritur neque Jur. præd. penitus ignorant & inde pet. advisament. & direction. præfat. Justic. & Curia hic & si super totam Materiam præd. per Jur. præd. in forma præd. compert. videbitur præfat. Justiciar. & Curia hic quod tenementa præd. cum pertin. per præd. ultimam voluntatem & Testum præfat. Johannis Stone devisat. sunt præfat. Sam. Birch pro Termino vite sue tunc Jur. præd. dicunt super sacrum suum præd. quod præd. Robertus Allen & Johannes Wilson sunt culpabiles de transgression. & ejection. firmæ præd. infra script. modo & forma prout præd. Willielmus South interius versus eos queritur & aliid. dampna ipsius Willielmi

South occasione infra script. ultra mis. & custag. suas per ipsum circa festam suam in hac parte apposit. ad sex denar. & pro mis. & custagius ill. ad 48s. sed si super totam Materiam præd. in forma præd. compert. ten ta præd. cum pertin. per præd. ult. voluntatem & Testum præfat. Joh's Stone non devisat. sunt præd. Saræ Birch pro termino vite sue tunc Jur. præd. dicunt super sacrum suum præd. quod præd. Robertus Allen & Johannes Wilson non sunt culpabiles de transgr. & ejection. infra script. prout iidem Robertus Allen & Johannes Wilson interius placitando allegaver. & quia præfat. Justiciar. & Curia hic de judicio suo de & super præmissis reddend. nondum advisantur dies inde dat. est partibus præd. in Statu quo nunc coram Domino Rege apud Westm. usq; diem Mercurii prox. post quinden. Paschæ de judicio suo inde audiend. eo quod præfat. Justiciar. & Curia hic inde nondum, &c.

In Testament for Lands in Tooting, upon the Demise of William Birch, and Sarah his Wife, a Special Verdict was found, That John Stone was seised in Fee of the Lands in Question; and by his Last Will and Testament, devised the Rents and Profits thereof to the said Sarah for Life, to be paid by his Executors into her Hands, &c.

The Question was, Whether this was a Devise of the Lands to her for Life, or to the Executors during her Life? If it was to her for Life, then the Testament is well brought upon the Devise of the Husband and Wife.

Those who argued for the Plaintiff, held that it was a good Devise of the Lands to the Wife for Life; for a Devise of the Rents and Profits, is a Devise of the Land itself: And the subsequent Words (Viz.) to be paid by his Executors, will make no

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Alteration

S. C. 1 Salk.
228. & Vide
ante 63, 98.
1 Vern. 104,
356.

Cases in Law
and Equity,
387.
Cases in Chan.
1 Vol. 176.

2 Vern. 310,
311, 312,
420, 424.

Alteration of the State, it makes them Beneficiaries to a particular Purpose, but gives them no Interest.

Carpenter
versus Collins.
Yelv. 73.

As for Instance: A Man had Issue a Son and a Daughter, and devised that his Son should have his Lands at the Age of 24 Years, and bequeathed 40*l.* to his Daughter at the Age of 21 Years, and appointed who should be his Executor, and that he should have the Oversight and Doing of all his Lands, &c. until the several Ages of his Children. It was adjudged, That the Executor had no Interest in the Lands by those Words, but only a Stewardship for the Benefit of the Heir.

Pigott versus
Garnish.
Cro. Eliz.
674. 734.

So in Trinity Term, 41 Eliz. The Testator being seized in Fee, devised to his Son in Tail, and appointed that the Overseer of his Will should educate his Son till 21, and receive, set and let for him: It was adjudged, that the Overseer had no Interest to make a Lease for Years in his own Name, but that he might make Leases at Will, and that his Receipts were for the Use of the Devisee.

2 Leon. Pla.
cited 380.

If a Man devises that his Land shall descend to his Son, and that his Mother shall have the Profits until he is of Age; the Mother married, and afterwards died before her Son came of Age: It was ruled, That the Husband should not have the Profits till that Time, because no Interest was devised to the Wife, but a Confidence for the Benefit of the Son.

There can be but three Pretenders to this State; the Heir at Law, the Executors, or the Devisee.

The Heir at Law cannot have it; for a Devise of Rents and Profits, is a Devise of the Land itself.

The Executors have no State by this Devise; for since the Statute of Wills, the Law never construed a Feehold to pass by such Words, without Necessity required it; for nothing is given to them, but that they shall pay, &c. and 'tis no Consequence, because they are to pay, therefore they must have the State in the Land.

Horton versus
Horton.
2 Cro. 74.

If a Lease is made, upon Condition that the Lessee should not alien but to his Children, and he afterwards devised Part of the Term to his Son, after the Death of his Wife, and made his Executors, and died; This is no Forfeiture, because the Law will not intend it to be a Devise to the Feme by Implication, to make a Breach of the Condition, in order to destroy an Estate expressly devised: So in this Case, the Rents being expressly devised to the Wife, though they are to be paid by his Executors, the Law will construe it to be a Devise to the Wife, because it both not appear that he intended any Interest to the Executors.

Those

Choke who argued for the Defendant insisted, That it was impossible to fulfil the Intent of the Testator, if the Estate should not be vested in the Executors: His Meaning was, that the Wife should receive the Rents for her Life, which she may do, if the Executors receive the Profits.

For the Defendant.

An Executor, Quatenus such, hath nothing to do with the Freehold, so that his Office is not concerned in this Case, but the Person is described who shall receive the Profits, and therefore such a Construction must be made of the Will, that all the Parts of it may stand together.

Can any Reason be assigned, why a Devise of the Rents and Profits, &c. should pass the Land itself, but only to fulfil the Intent of the Testator by Implication? For the Right which is given to a Man to receive the Profits entitles him to the Land; but if any thing appear in a Will, to shew the Intention of the Testator to be otherwise, there the Law will never make it an Estate by Implication.

Comber. 371.
Cases in Law
and Equity,

94.
1 Vern. 104.
2 Chan. Rep.
117, 118,
119.

If an Estate of Freehold should be vested in Sarah the Wife, then her Husband would have it during her Life; and if he should be outlawed or become a Bankrupt, it would then be forfeited for his Life, and during that Time, she could not have the Profits; which is directly contrary to the Will.

The Law hath appointed no particular Words to dispose a Freehold by Will; therefore such Words which shew the Intention of the Testator to devise such an Estate, are sufficient to make it so. Now an Executor cannot pay the Rents into the Hands of the Wife, unless he hath some Estate in the Land to sue for and recover the Profits, if the Tenants should deny Payment.

As to the Case of Carpenter and Collins, tis not to this Purpose, for that was only an Appointment to the Executors to look after the Land; they were no more than the Overseers of the Will, and had no legal Interest by that Devise.

Curia. In Trinity Term 1696. Judgment was given for the Defendant, by the Opinion of two Judges, against the Chief Justice, who held that the Intent of the Testator would be better fulfilled if these Words should be construed to give an Interest to the Executors during the Life of Sarah, because the Will being penned against her Husband, by such a Construction he would have nothing to do with the Rents.

But by the penning this Will, the Executors have no Interest by these Words, for if they should, it would contradict the precedent Devise of the Rents and Profits to the Wife; and that would be to make a Devise by Implication to the Executors, to con-

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contradict an express Debit to her for Life; but by the Opinion of the other Judges, the Defendant had Judgment.

Robinson *versus* Groscourt.

Vide post. 197,
167, 319,
320, 438,
439.

8 Mod. 123,
177.

1 Mod. 10.
164.
Ray. 447.

1 Salk. 341,
352.
Mod. Cases in
Law and E-
quiry, 1st Pt.
211, 212.

Comber. 10.

Comber. 372,
373.
Skin. Rep.
371, to 384.

THE Chamberlain of London brought an Action of Debt against the Defendant, for a Forfeiture upon the Breach of a By-Law, which being removed in this Court by Habeas Corpus, the Lord Mayor, Aldermen and Sheriffs made this Return; (*viz.*) That the City of London is an ancient City, and that there had been a Custom there, Time out of Mind, for the Mayor and Aldermen for the Time being, with the Consent of other Faithful People, to make By-Laws for the Common Good of the Citizens, as often as there should be Occasion: That these Customs were confirmed by Act of Parliament; That at a Common-Council held at Guildhall, 11 Sept. &c. a By-Law was made; (*viz.*) That whereas the Master, Warden, Assistants, and Commonalty of the Art and Science of Musick, Freemen of the said City, had been an ancient Brotherhood, and that no Person not being a Freeman ought to use any Art or Occupation within the said City for Gain; That many Foreigners did take upon them the Art of Dancing, not being free of the said City, nor Members of any Fraternity, &c. For Remedy whereof it was enacted by the Mayor, Aldermen and Commons, That every Person using the Occupation of Musick and Dancing, within the said City, who shall have a Privilege to be made free by Patrimony, shall at next Court of Assistants of the Company of Musicians, after Notice, accept and take upon himself the Freedom of the said Company; and that every Person who hath served an Apprenticeship to the Mystery of Musick and Dancing, and not made free, and shall yet exercise his Trade, shall forfeit 10 L. for every Offence, to be recovered by Action of Debt or Plaint, in the Name of the Chamberlain, in the Mayor's Court, one Moiety after Conviction to be paid to the Chamber of London, the other Moiety to the Master, Warden, and Assistants of the said Company, for the Use of the Poor thereof.

It was argued for the Defendant, that By-Laws are good or bad, in respect to the End for which they are made, as against Frauds by Blackwell-Hall Factors, against restraining the Number of Carts and Coaches: But where the Publick is not concerned, a Man shall not be restrained of his Liberty by any Law whatsoever.

Therefore this By-Law is void:

1. For the Matter, because it is trivial; there are several Trades in mean, that they are not within the Intention of the Statutes of Bankruptcy, though those Statutes speak generally of all Persons using the Trade of Merchandise, by Way of Bargaining, Exchange, &c. or otherwise ingross or retail, or seeking his Living by buying and selling, &c.

All Customs or Laws which restrain Trade, are to be taken very strictly, because at Common Law any Man might use what Trade he thought fit; which is now restrained by the Statute 5 Eliz. to an Apprenticeship; but that being performed, he may set up his Trade where he can most conveniently.

A By-Law, without a Custom of the Place to support it, will not bind. Now the Custom of this Place is, That no Person not being a Freeman, ought to use any Art or Occupation within the City of London for Gain, not being Free of the City, nor Member of any Fraternity; so that this Custom doth not bind a Man to be Free of any particular Company; and then the By-Law exceeds the Custom, because though the Person is free, yet if he doth not take his Freedom of the Company of Musicians, it is not good.

This By-Law doth tend to deprive Persons of their Freedom, though they are entitled to it by Birth or Service, and to take away the Interest which they have, and which is vested in them by Custom; for there may be a Custom to appropriate particular Privileges to a Corporation, exclusive to all other Persons; but a By-Law without a Custom will not do it, because it is against the Liberties of the People in general.

2. The Penalty is exorbitant, in making the Forfeiture to be 10 l. for every Offence; And this hath often been adjudged in Cases of Lords of Manors, who have set arbitrary Fines on their Tenants; that notwithstanding they had Power to impose Fines, yet it must be according to Justice and Reason.

The Case which most resembles this, is that of Paine and Haughton, where the King by Letters Patents granted a Power to the Mayor and Commonalty of this very City to make By-Laws, and this was confirmed by Act of Parliament; Afterwards they made a By-Law, That no Carman should use a Cart in the City without a Licence from the Wardens of such an Hospital, under the Penalty of 15 s. This was adjudged void, because it was in Nature of a Monopoly, and made only for the private Benefit of such Wardens, without any Respect to the publick Good,

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3. The

2 Show. Rep.

267, 270.

Comb. 181,

182.

Skin. Rep.

291, 292,

293.

Mod. Ca. in

Law and Equ.

part 1. 46,

47, 48.

Comb. 53, 54,

55, 56, 121,

122.

1 Salk. 192,

193.

4 Mod. 27,

28.

Comb. 43, 44,

Skin. Rep.

247, 248,

249, 250,

251.

1 Roll. Abr.

364.

3. The Penalty is to be recover'd by Action of Debt or Plaint, in the Name of the Chamberlain in the Mayor's Court, and one moiety after Conviction is to be paid to the Chamber of London. Now for this Reason the By-Law is void, because it is to make them Judges in their own Cause; which is contrary to the Rules of Law, that it hath been held, If a Judge take the Caption of a Fine where he is a Party, the Cognizance is void.

Co. Litt. 14.

4. This Custom is not applied to those who are free of the City, but it is said at large to be in the Mayor and Aldermen for the Time being, with the Consent of other faithful People, to make By-Laws, &c. which may be People of any other Place; and therefore it is naught, not being bound up to the Freeman of the City; for so was the Return in Wagoner's Case, (viz.) De assensu Communitatis ejusdem Civitatis.

8 Rep. 122.

5. Here is an arbitrary Power given to the Company of Musicians, who, by admitting a Man into their Fraternity, may take what Fine they please; and if they refuse to admit him, there is no Penalty given by this Law to the Person thus refused to compel an Admittance, which is to put a certain Number of Men under the final Jurisdiction and Power of others; and that is contrary to a fundamental Rule in the Law.

1 Roll. Abr. 363.

Therefore a By-Law made by the Merchant-Adventurers, That no Man should buy or sell at four Fairs within such a Prince's Dominions, without first compounding with them, and paying a Fine; was held to be void, because it was an Infringement of the Liberties of others not being free of that Company.

But admitting this By-Law to be good, they ought to have returned, That the Defendant had Notice of it, and the rather because he is not one of their Company; and it is a Rule in all Cases, Where Penalties are impos'd by way of Forfeiture, that the Party ought to have Notice of the Law. Those who argued on the other Side, answer'd some of the Objections, (viz.) As to that Objection, That the By-Law was void, because a moiety of the Penalty was to be for the Use of the City: Admitting it to be void for that Reason, yet that will not make the whole By-Law so, because it may be good in Part, and void in Part.

Econtra.

sid. 107.

The same Objection was taken in the Case of Player and Archer, where a moiety of the Fine was appointed for the Maintenance of Christ's Hospital, and the other moiety to the Mayor and Aldermen, &c. and there it was insisted, that the Court of Aldermen would be both Judges and Parties, yet a Proceudo was not allowed,

107. 2

Neither

Whether is this By-Law contrary to a Custom, as excluding those who have Right by Birth to be Freemen, because it is necessary, that even in such Cases the Party ought to be free of some Company, otherwise he cannot be free of the City; and if it is necessary that the Defendant should be free of a Company, why not of the Company of Musicians, which is the most agreeable to the Art of Dancing? And if he refuse, why may not the Court of Aldermen have Power to impose him upon that Company?

As to the first Objection, That this By-Law is void, because it is made about a trivial Matter: The Question is not about the Meaness of the Thing, but whether the Subject Matter is within the Jurisdiction of the Court of Aldermen; and if so, then whether they have done what is reasonable?

And as to that, it cannot be denied, but that Musicians are an ancient Brotherhood in London, and have been always under the Care and Government of the City, and the Law now in question carries a Condescency in the very Nature of it, for it is to keep good Order in the City, that the Dance should not be taught but by such who are approved Masters in this Art; and it is not the Meaness of Trades which excludes the People who exercise such Trades from the Care of the Civil Magistrate; for then Inn-keepers, Comb-makers, Pattern-makers, and many other Trades, would be under no Government, which is most necessary in such mean Employments; such People are subject to By-Laws, not in Respect of their Occupations, but by Reason of the District where they inhabit, that they may be kept in due Conformity and Order.

It is admitted by those who argued on the other Side, That a Custom may be good to exclude particular Persons from certain Privileges, but that a By-Law cannot do it. Now it will not be denied, but that there is a Custom in London, which enables them to make By-Laws, and that their Customs differ from others. Now, if a By-Law is founded on such a general Custom, and made in Pursuance thereof, it is as good as if there was an express Custom for this very Purpose.

As to the Penalty being excessive, the Court are the proper Judges thereof: There are many By-Laws where the like Penalty is inflicted, and those which had the least during all the Reigns of Ed. 6. and Queen Eliz. have 40s. and some of them 5 l. so that this is but a reasonable Fine.

Curia. Though the Custom is, That whoever is free of the City, must be free of some Company; yet that Custom doth not oblige

Mod. Ca. in
Law and Equ.
part 1. 267,
268, 269,
270

oblige a Man to be of any particular Company, for if it should, then tho' the Defendant is entitled by Birth to be free of such Company, yet he must also be free of this, otherwise he cannot exercise this Art, which is unreasonable.

They may make him take his Freedom, but cannot direct in what Company; for if they had ordered the Defendant to be admitted of the Blacksmiths Company, it had not been good.

It may be a Question, whether the City hath a Power to enforce Men of no Trades to be free of those Companies which are suitable to their Professions? As Dancing is no Trade, but it may be called a Profession. It is true, Musick is suitable to it; but it is not absolutely necessary that a Dancing-Master should be free of the Musicians Company: There is no Fellowship of Refiners; but the Court of Aldermen cannot order them to be free of the Goldsmiths Company, which is the most suitable to them.

1 Salk. 143.

So that this cannot be a good By-Law, because the Defendant cannot be compelled to be of that particular Company, and it is sufficient if he is of any other, which he may be for any Thing that appears upon this Return: It is in Nature of a Monopoly to the Company of Musicians, who cannot be compelled to make him free of that Company in case they had refused. So in Trinity Term, 8 Will. Judgment was given accordingly.

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Term. Sancti Mich.

Anno 7 Will. III. in B. R. 1695.

Britten versus Cole, Trin. 7 W. 3. Rot. 187.

Glouc. ff. **J**ohannes Britten queriter de Thoma Cole in Custod. Mar. Maresc. Domini Regis coram ipso Rege existen. de eo quod ipse vicesimo Die Martii, Anno Regni Domini Willielmi Tertii, nunc Regis Angliæ, &c. septimo, apud Hannam in Parochia de Bitton in Com. præd', Vi & Armis, &c. Averia, viz. quadraginta & tres Oves, & duos Agnos ipsius Johan. Britten, Pretii sexdecim Librarum cepit & abduxit, & alia Enormia ei intulit contra Pacem dict. Dom. Regis nunc, ad Damnum ipsius Johan. quadraginta Librarum, & inde producit. Sextam, &c.

Et modo ad hunc Diem, scil. Diem Veneris prox. post Tres Sanctæ Trinitatis isto eodem Termino usque quem Diem præd. Thom. habuit Licentiam ad Billam præd. interloquendi, & tunc ad respondend', &c. coram Domino Rege apud Westm' ven. tam præd. Johannes per Attorn.

suum, &c. quam præd. Thomas per Philippum Hodges Attorn. suum, & idem Thomas defen. Vim. & Injur', quando, &c. & quoad venire Vi & Armis, seu quicquid quod est contra Pacem dict. Domini Regis nunc, idem Thomas dicit, quod ipse non est culpabilis, & de hoc ponit se super Patriam, & præd. Johannes Britten similiter, & quoad resid. Transgression. præd. superius fieri supposit. idem Thomas Cole dicit, quod præd. Johannes Britten Actionem suam præd. inde versus eum habere, seu manutene- nere non debet, quia dicit, quod ante præd. Tempus quo Transgressio præd. superius fieri supponit', scilicet, duodecimo Die Februarii, Anno Regni dict. Domini Regis nunc sexto quoddam Breve dict. Domini Regis nunc de levari facias e Curia ipsius Domini Regis de Scaccario apud Westmonaster. in Comitatu Midd. tunc existen. emanavit, Vicecom. Gloucestr. direct', per quod quidam Breve idem Dominus Rex

F f

recitan',

recitan', quod cum Ric'us Cocke
Bar. tunc nuper Vicecom. Glouc-
cestr. pred. Virtute Brevis ipsius
Domini Regis de capias utlegat
extra Curiam ipsius Domini Re-
gis apud Westmonasterium versus Franciscum
Creswick de Henricus Cautt,
infra Paroch. de Bilton in Cam-
brid' Ar. utlegat in Curia So-
merfet. duodecimo Die Junii An-
no Regni dicti Domini Regis
& Domine Marie nuper Regi-
ne Angliæ &c. quædam ad festum
Thome Cole Ar. modo Defend'
de Mart' Ursis nuper de Plante
Dabiri emendat. paret. nuper
Vini directi vicecom. octavo Die
Septembris Anno regni super-
dicti cepit. & scripsit in Manus
ipsius Dom. Regis & Dom. Regi-
ne nuper Caput. Morsing. &c.
Tunc nuper [procat. Henricus
Cautt] cum omnibus filijs
Scolis. &c. &c. &c. &c. &c.
Scolis. &c. &c. &c. &c. &c.
Festum. &c. &c. &c. &c. &c.
Clarus Pastur. &c. &c. &c.
vocat. &c. &c. &c. &c. &c.
Eliminationem quatuordecim. Acres
unum. &c. &c. &c. &c. &c.
[vocat. &c. &c. &c. &c. &c.]
continen. per Eliminationem octo
Acres. &c. &c. &c. &c. &c.
Quatuordecim. &c. &c. &c. &c. &c.
&c. &c. &c. &c. &c. &c. &c.
cuius. &c. &c. &c. &c. &c.
nulle. &c. &c. &c. &c. &c.
&c. &c. &c. &c. &c. &c. &c.
&c. &c. &c. &c. &c. &c. &c.
Francis Cres-
wick. prout per Transcript. predi-
Baris de capias utlegat. & Re-
turn. ejusdem. & cujusdam Inqui-

sition. superinde capt. in Scac-
cium dicti Domini Regis nunc
constituit. & ibidem in Custod.
ipsius Domini Regis remanen-
plena appareat pred. Domi-
ni Rex de Redlit. Exit. &
Francis pred. faciat & res-
ponder. volen. (ut est iustum)
pensis. Vice Gloucest. per pred.
Breve de levari facias precepit.
quod non omittat propter ali-
quam Libertatem quin eam in-
gred'. & omnes & singulos Bar-
ones. &c. &c. &c. &c. &c.
forum pred' cum Pertin. & cu-
juslibet inde Parcel. presentem. &
dict. Thomas Capion. eorum-
dem in Manus pred. Dom. Regis
nuper ad festum Annunciationis
beate Marie Virginis tunc pro-
fuit. &c. &c. &c. &c. &c.
nomine. &c. &c. &c. &c. &c.
Temporis & jure. &c. &c. &c.
anual. &c. &c. &c. &c. &c.
fuit. &c. &c. &c. &c. &c.
quod. &c. &c. &c. &c. &c.
habere. &c. &c. &c. &c. &c.
dicti Dom. Regis apud West-
monasterium. &c. &c. &c. &c. &c.
fuit. in unum. &c. &c. &c.
Domini Regis tunc ibidem ad
Usum ipsius Domini Regis sol-
vend'. & quod habere ibidem
tunc Breve illud. Virtute cujus
quidem Brevis de levari facias
Nathaniel Riller Ar. adunc &
adhuc Vicecom. Gloucest. pred.
episcopi. post Remissionem ejusdem
Brevis. &c. &c. &c. &c. &c.
Anno Regni dicti Domini Regis
nunc sept. apud Bilton. pred.
fuit. &c. &c. &c. &c. &c.
sub Sigillo Officii ejusdem
Vicecom. direct. omnibus Balli-
vis

vis Decenar. ceterisque Officiariis
ejusdem Com. necnon Antonio
Powell, Johanni Cobia, Johanni
Oker, & Josepho Powell, Balli-
vis suis per quos dicitur Vic. de
dona Ballivi & ceteris Officiariis
quod mandatum quod dicitur de
singulis. Eodem de Prohem
Pamell. in brevi pred. superius
quantum cum parit. & in ius-
ticia inde Parol. parit. & di-
cto tempore capite. Eadem
in Manus dicti Dom. Regis nunc,
usq. ad Festum Annuntiationis be-
te Marie Virginis tunc prox. fu-
tur. per tota tempora, & ius-
ticia & annu. Valorem supe-
rioris mentionis. fuit colligi &
levati fac. in quod pred. Na-
thaniel Ridler. pred. Viccom.
pred. illa haberet coram Baro-
bus Scutarii dicti Domini Regis
apud Westm. a pred. die Pasch.
tunc prox. futur. in tunc Man-
fem in Curia ejusdem Dom. Regis
tunc ibidem ad usum ipsius Dom.
Regis solven. secundum exigen-
tiam brevis pred. & idem Tho-
mas Cole, ultimus dicit quod
pred. Capital. Messingham, five
ten-tum [vocat. Pannum Court]
pred. sepel. claus. & parol.
passus catenq. pmissis in brevi
de levati fac. pred. mentionis.
tempore mentionis. ejusdem bre-
vis & sepel. tunc temporibus
pmissis. & ceteris. allegat. in
eodem brevi de levati fac. reci-
tat. fuer. & adhuc sunt jacen. &
eiusdem. in Pannum pred. infra
Paroch. de Biton pred. in Com.

Gloucestri. pred. ac quis pred.
quadraginta & tres oves & duo
agapost. Eadem. brevis pred.
levati fac. & confessionem War-
right. & ante pred. Festum An-
nuntiationis beate Marie Virgi-
nis, videlicet. pred. Tempore quo
fuerunt in pred. clauso pa-
stura [vocat. Biton] in Biton
nam infra Paroch. de Biton
pred. existens. parol. pmissis.
tunc pred. in pred. brevi de leva-
ti fac. pred. mentionis. ibidem
deparol. levati. & eubam. idem
Thomas Cole, ad tunc & ibidem
requissit. prefat. Antonium
Powell & Johannem Powell, ad
caplen. & abducent. pred. qua-
draginta & tres oves & duos
Agnos ad fien. de exitibus & pro-
fuit. pred. secund. exigentiam
brevis pred. de levati fac. prefat.
Vic. direct. & Warrantum pred.
per eundem Vic. fact. super quo,
&c. * Johannes Powell & Jo-
sephus Powell, Oves & Agnos pred.
pred. tempore quo, &c. apud
Pannum in Paroch. de Biton
pred. ceperunt & abducent.
que sunt idem resid. transgressio-
nis pred. unde pred. Johannes
Britten superius versus eundem
Thomam Cole queritur & hoc
parat. est verificare unde petit ju-
dicium si pred. Johannes astio-
nem suam pred. inde versus eum
habere seu manutenere debeat.

H. G.

**Demonstr. and Joinder
in Demonstr.**

Britten

* Note, The
Warrant
was not di-
rected to
John, but to
Anthony,
therefore
upon a Mo-
tion to a-
mend it, this
was granted;
for per Ca-
rian, It is a-
mendable
within the
Statute 8 H. 6.

S. C. 1 Salk.
395, 396,
408, 409.

Britten versus Cole.

Comber. 434.
345.

IN Trespass for taking his Cattle, the Defendant pleaded Not guilty as to the Force, and made a special Pleading as to the Return, (Viz.) that a Letter Patent issued out of the Exchequer, directed to the Sheriff of Gloucester, testifying, That by Virtue of a Capias utlagatum against Fra. Croftwick, at the Suit of the Defendant Cole, the said Sheriff had seized into the King's Hands one Messuage, and several Lands of the said Croftwick, being of the yearly Value of 54*l*. beyond all Charges and Reprises, by which Writ of Levam the Sheriff was commanded to levy the Debt due to the Defendant Cole out of all and singular the Rents, Issues, and Profits of the said Lands, thereupon the Sheriff made a Warrant to several Bailiffs to levy the Profits of the said Lands, &c. and the Sheep and Lambs being Levied and Conveyed upon Parcel of the Lands so seized into the King's Hands, the Defendant required the Bailiff to take and carry them away: Super quo the Bailiff did take them, which is the Return of the Trespass.

On this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

1 Saund. 21,
22.
2 Lev. 175.
Comber. 471.

The Question was, Whether the Defendant Cole hath well entitled himself to command the Bailiffs to execute this Writ? For he cannot justify under it himself, because it was not alleged that it was prosecuted at his Suit, or that the Bailiffs had the Warrant, or that they took the Cattle Virtute Warrant, and he cannot justify in Auxilium of the Bailiffs, because he was not present: If therefore he hath not shewed a sufficient Justification, the Plaintiff ought to have Judgment.

Therefore it was said, that he ought to have made himself one of the Bailiffs, or that he acted in Aid of them, but he hath set forth, That because a Warrant was directed to them, therefore he came without their Consent, or assisting them, and commanded them to take the Plaintiff's Sheep: So that tho' there was a good Warrant to the Bailiffs, yet the Defendant, who in this Case is a Stranger, had no Authority to require them to take the Goods of another.

Cro. Car. 446.

The Writ and Warrant cannot give Power to any Person but to him to whom it is directed, or to the Party called in Aid by the proper Officer. As for Instance, In an Action of false Imprisonment, the Defendant justified by Virtue of a Warrant from the Sheriff, directed to the Bailiff who arrested the Plaintiff, and

required

required the Defendant to assist him to keep the other in safe Custody: But here the Defendant is a mere Stranger to the Writ, neither named in it, or called to the Assistance of that Person to whom it was directed; and yet he required the Bailiffs to carry the Cattle away.

2. The Defendant doth not contest and avow as he ought to do, for he justifies the Trespass without acknowledging the Taking: He should have pleaded, that the Writ was delivered to the Officers in forma juris exequendi, and that they took the Cattle virtute Warranti; but here he hath pleaded the executing before the Delivery of the Writ, and sets forth, super quo John Powell took the Sheep when the Warrant was not directed to him, but to Anthony Powell, so that John could have no Authority to take them.

1 Saund. 18,
Co. Entr. 42,
196, 667.

3. He could not plead a Writ of Execution out of such a Court, without shewing a Judgment to warrant it, which he ought to have averred, and therefore he should have pleaded, that he sheweth an Original, &c. and the Outlawry thereon, and then set forth the Levamur facias; for tho' the Writ without the Judgment will justify the Officer in the Execution of it, yet it will not justify a Stranger to require him to do it.

1 Sid. 135.

4. The most material Exception was, (viz.) It is said, that the Sheriff made a Warrant directed to the Bailiffs, and that the Defendant required them to seize the Cattle, super quo they did take and drive them away, but doth not say, that they had a Warrant at that Time, or that they took them virtute Warranti. Now these Words, super quo, &c. can have no Reference to the Writ and Warrant, but only to the Request, (viz.) Super quo Rogatu, he took them.

Then as to the Matter in Law, the Question was, Whether the Cattle of a Stranger Levant and Couchant, upon the Lands of an outlawed Person, may be taken and sold by Virtue of the Writ Levamur facias?

And as to that, it is necessary to consider the Statute W. 3. which directs the Sheriff what shall be accounted Issues, viz. Rents, Corn in the Grange, and all Moveables, except Horse-Harness and Household-Stuff, and my Lord Coke, in his Comment upon this Branch of that Statute, explains it to be not only the Rents and Revenues of the Land, but Corn in the Barn, and all other moveable or personal Goods whatsoever.

Cap. 39.
Ca. in Law
and Equ. 358,
359, 380.
2 Inst. 453.
Carth. 442.

But this Statute says not a word of this Case. It only speaks of the Sheriff's Return of a Defendant's Land, viz. that the Sheriff is to make such Return in making Quodammodo to the Court. It says not a word of this Case, or if a Sheriff of a County has really the Return of a Defendant's Land, he would do nothing, and that the Sheriff would be bound to return the same to the Court, and no Sheriff could be bound to return such Return. Now this Statute provides a Remedy against such Sheriff's Return, so that the whole Extent of it seems to be only to provide upon Originals, and the returning of them is only to make the Party appear, and it is never carried further than the Court of his whole appearance is required. And this seems plain by ancient Authorities, for as often as any Question hath been made upon this Statute, what are the Issues which Sheriffs must return, not only Rents, but all the Goods which the Defendant had at the Time of the Writ put in charge, have been allowed to be Issues, which seems that he, and not another, must be Proprietor of such Goods.

But let the Issues be what they will, the Return of a Stranger cannot be accounted in this Case, because nothing is looked for by the Outlawry, but only the Profits of his Land which is outlawed, and the Levant facies is only to make the Sheriff accountable for the Profits as they arise, which are Rents and Corn, &c.

Can therefore the King be said to have the Occupation and the Profits of the Land in such Case, for if the Law was so, then he might plant and sow, and cut down Timber, for that is Part of the Profits, but this he cannot do upon such a Forfeiture: Therefore he is only entitled to the Profits as they arise upon the Land, which is all that is forfeited to him upon an Outlawry in a personal Action, and such Outlawry, and the Impignation taken upon it, is to ascertain him what is forfeited; if it is a Rent, then he is to have the Rent; if a Manor, he is to have it; but he must not plant and sow the Demesne, for the Land is not the Debt.

Neither doth the Sheriff's Return make any Debt to the King, for he is to make the best of the Land, and account for it, but cannot be charged with Issues, as he will be where Issues are returned.

Now as to the finding the Issue, that is not conclusive upon the Plaintiff, unless he can make the Man Debtor.

If the Estate of a Stranger had been on the King's Land, which he had in Right of his Crown as forfeited by Outlawry for a Felony, he could not have seized them for a Debt due to himself, and

Plowd. 541.
Br. Tit. Issue
Return 9.
2 Roll. Abr.
808.

9 H. 6. 18.
Br. Tit. Issue
Return 9.
Tit. Outlawry
36.

and therefore not in this Case where the Land is not forfeited at all, but only the Tenant's personal Estate, which is very different from the Forfeiture of the Land to the King, but only the Land to the Land.

And where the King hath taken the Goods of the Land upon a Warrant in Treason, yet if the Tenant of the Land makes a Forfeiture thereof to another, the Goods as to the King shall remain to the King.

21 H. 7. 7.
Comb. 469.
470.
Carth. 442.

It is also to be objected, That a Stranger may be taken of a Stranger's Cattle for a Debt due to the King, if they are Levant and Couchant on the Land, that will not alter this Case; for no Authority can be found, that even in such Case the Goods to the King might be sold, though the Law is otherwise now by a late Act of Parliament.

2 Roll. Abr.
179.
Cro. Eliz.
431.

In Trover, the Defendant justified the taking the Goods as Belonging to the King, of his Manor of Dunstable, upon a Warrant thereunto, and Process was thereupon directed to the Defendant in that Case as Bailiff, &c. by which Warrant he distrained and seized the Cattle; and it was adjourned upon a Demurrer, that they could not be sold upon a Warrant in a Court Baron.

2 Cro. 355.
Yelv. 194.
Idem.

It is true, it hath been ruled in Trover, upon this matter, where the Evidence was, That the Goods were taken and sold by virtue of a Commission of Sewers, that such Distress and Sale was good; but it is not mentioned any where, that the Cattle of a Stranger might be taken and sold for the Debt of Fault of another.

Allyn 92.
Style 12.

And therefore, where a Custom was alledged for a Lord of a Manor to take the best Beak which the Tenant had at the Time of his Death, and if such Beak was refused, then to take the like of any other Man, whose Beak should be Levant and Couchant upon the Personable Land: This was held a good Custom, because it made the Goods of a Stranger forfeitable for a Debt of another.

Dyer 199.
Benl. 39.
Co. Ent. 666.
Comb. 436.

But the Year-Book, 21 H. 7. hath this Case in Point, where the King had the Prerogative of a Man's Land by Distress in a personal Action, and the Cattle of a Stranger committed Treason on that Land; it was held, that though he had a sufficient Interest to maintain an Action of Treason, yet he could not seize the Cattle. If the Law should be otherwise, there Inconvenience would follow:

21 H. 7. 2.
Br. Prerog.
Pl. 29.

Upon such a Seizure, the Subject must lose his Cattle without a Trial, to which he cannot be admitted against the King.

2. If a Tenant's Cattle come upon the Land where the King is thus entitled to the Profits, for want of paying the Rent; this Tenant must both answer the Rent to his Landlord, and forfeit his Cattle to the King, which is unreasonable. But common Experience shews, that the Law is otherwise; for whenever this Case is issued, the Tenant is never altered, or put out of Possession; for it is no more than a Charge upon the Sheriff to levy so much Money for the King, who can have no more forfeited to him than the outlawed Person could forfeit, and that was no more than what he had in his own Right: So that if the Cattle of a Stranger came thither wrongfully, he might have an Action of Trespass, but cannot have an Execution at the first Instance.

Econtra pro Def.

Those who argued on the other Side, answered the Exceptions taken to the Pleading.

1. That this being in the Case of the King, and to levy a Sum certain out of the Rents and Issues of the Land, it is lawful for any Person to assist the Officer in the Performance of his Duty; and therefore it hath been held a good Justification, that the Defendant came in Auxilium of the Officer, without saying per Mandatum; for the Substance of the Plea is the Writ to the Sheriff, and the Warrant to the Officer.

stin. Rep.
619.

2. It is pleaded, That a Warrant was directed to the Officers, and the Defendant required them to take the Cattle, super quo they did take them; which is as well pleaded, as if he had set forth that the Warrant was delivered to them: And though it was directed to Anthony and Joseph Powell, and they were required to take the Sheep, &c. and it appeared they were taken by Joseph and John, who was neither named in the Writ, or required to take them; it may be good enough, because the Taking by John is void, and then there will be sufficient Matter for Joseph to justify.

As to the Matter of Law, it was never yet disputed; therefore it must be presumed, that the King hath a Right to have the Cattle; for if the Sheriff should not have Liberty to take a Stranger's Goods Levant and Couchant on the Lands of an outlawed Person, the Levavi Facias would be of very little Use.

There

There is no greater Hardship in this Case, than for a common Person to seize the Cattle of any Person whatsoever, Levant or Outlawed, on the Land charged with Rent; and it cannot be denied, but such Cattle are distrainable.

Comber. 459.
470.
Carth. 442.

It is true, the King shall be allowed no more than the extended Value; and if more is made of it, the Owner shall have it.

Hardr. 106.

This Writ is to levy the Issues of the Land, and not of the Person outlawed; and the Profits being taken by the Cattle of a Stranger, it is reasonable the King should seize them; And this Writ runs the Charge of the Exchequer Writ out of Writ.

There can be no Doubt of what is meant by the Cattle Issues; my Lord Coke, in his Comment upon the Stat. of Westm. 2. both not restrain them to the Goods which the Defendant had at the Time of the Writ purchased, but declares them to be all moveable and personal Goods whatsoever.

2 Inst. 473.

Curia. If the King had a Rent issuing out of Land, a Stranger's Cattle may be distrained and sold for such Rent in Arrear; in like Manner, where he hath the Pernancy of the Profits returned upon an Outlawry, it is a Charge upon the Land itself arising de Exitibus; and what those Issues are hath been sufficiently described by the Stat. Westm. 2. the very Being on the Land makes the Cattle Issues.

Comber. 437.
470.
Skin. Rep.
617, 618.

Now the Land being charged with an annual Value to the King, where shall he have any Remedy for that Value, if a Stranger's Cattle eats the Profits, and are not liable to a Seizure.

And it is no new Thing in the Law, to punish one for the Fault of another; as if there is Tenant for Life, Remainder in Fee, and the Tenant for Life forfeits Issues and dies, they shall be levied upon him in Remainder, for they are to arise de Exitibus Terræ.

This Writ itself imports, that the Charge is upon the Land; for in other Executions, the Sheriff is commanded to levy the Debt de Bonis & Catallis; but in this it is to levy so much de Exitibus Terræ: And therefore it seems unreasonable, that the King should be put to an Action of Trespass against the Owner of such Cattle which are Levant, &c. on the Lands of the outlawed Person.

It is true, if he had made a Lease of such Lands before the Tenant returned, then the Cattle could not be seized by Virtue of this Writ; but even in such Case, he must plead, that the Lease was made before the Outlawry: But here the outlawed

H h

Person

Person still continues in Possession, and having no Cattle of his own, takes in several Hens Cattle to agst.

The King hath not the Lands forfeited upon an Outlawry, but the Profits only; and when they are found by an Inquisition to be of such an yearly Value, then the Lands remain a Debt to the Crown till the Debt itself is satisfied, but he can only agst. or mole these Lands; therefore if he could not seize the Cattle of a Stranger which eat up the Profits, he would have but little Benefit of an Outlawry.

Between, the Law is, If Issues are forfeited for not appearing of Jurors, the Cattle of a Stranger may be taken on their Lands for such Forfeitures, which cannot be distinguished from this Case.

There can be no Inconveniency nor Danger, that the Sheriff should sell the Cattle thus seized, because he is to return the Contract or Agreement for depasturing them, and then the Owners are to stand charged to pay the Money to the King; but it would be inconvenient for him to punish such Owners in an Action of Trespass, for that is a Remedy which was never yet taken.

Herbert *versus* Waters.

S. C. 1 Salk.
205. & vide
ante 76, 77.
43 Eliz. c. 2.

IN Replevin, the Defendant as Overseer of the Poor justified the Taking, by Virtue of the Statute 43 Eliz. for a Poor Tax; by which Statute it is enacted, (Viz.) That if after Issue tried for the Defendant, or Nonsuit of the Plaintiff after Appearance, the Defendant shall recover treble Damages, to be assessed by the same Jury, or a Writ to enquire of the Damages, as the same shall require, &c.

The Plaintiff was nonsuit, and the Jury had not assessed the Damages; and now the Court was moved to award a Writ of Enquiry to supply that Defect upon these Authorities.

1 Roll. 372.

IN Anno 13 Jac. The Defendant justified under this very Statute, in an Action of Trespass brought against him; and the Plaintiff being nonsuit, a Writ of Enquiry was awarded for the treble Damages.

2 Roll. 112.

Anno 17 Jac. In Replevin, the like Justification was made, as in this Case; and the Plaintiff was nonsuit; and upon a Writ of Enquiry awarded, Judgment was given for the Defendant, and a Writ of Error brought, because the Enquiry was erroneously awarded, since the Statute expressly requires, that the said Jury shall enquire of the Damages; but that Exception was

was over-ruled: For though the first Jury might have inquired, yet it was only an Inquest of Office, and no Part of the Issue, nor was it a Thing for which an Attaint would lie against them; and therefore it is within the Rule taken in Cheyney's Case, *Viz.* That where the Court *ex Officio*, ought to enquire of a Matter upon which an Attaint lieth, the Omission of it may be supplied by a Writ of Enquiry.

1 Sid. 380.
Carthew 362.
Cases in Law
and Equity,
274.
10 Rep. 119.
Comber, 11.
Skin. Rep.
191, 196.

Besides these Authorities in Point, there are other Cases adjudged in Law which come near this, (*Viz.*) Where a Demurrer is joined upon the Evidence, the Jury are as much discharged from trying the Issue, as they are upon a Nonsuit; for the Fact being agreed by both Parties, the Judgment of the Court is then demanded, Whether the Matter given in Evidence be sufficient to find a Verdict for the Plaintiff upon the Issue joined?

Now tho' the Jury are discharged of the Issue, yet they ought to assess Damages continually, (*Viz.*) *Si lex est cum querente quod præd. Defend. est Culpabilis quodque præd. (the Plaintiff) occasione Premissorum sustinuit damna, &c.* yet if this shall be omitted, it may as well be done upon a Writ of Enquiry of Damages after Judgment is given upon a Demurrer; and for these Reasons a Writ of Enquiry was granted in this Case.

Cro. Car. 143.

Redshaw versus Hester. Trin. 7 W. 3. Rot. 178.

London. ff. **M**emorandum quod alias scilicet Termino Pasche, Anno Regni Domini Willielmi Tertii, &c.

ff. Christopherus Redshaw & Anna Redshaw, Executores Testamenti & ult. voluntatis Georgii Redshaw nuper de Wapping in Com. Middlesex Nautæ defuncti. queruntur de Willielmo Hester Filio & Hærede Willielmi Hester defuncti. nuper dicti. Willielmum Hester Civem & Soap-Baker London in Custod. Mar. Marefc. Domini Regis coram ipso Rege existen. de placito quod reddat eis mille libras legalis monete Angliæ quas eis injuste detinet

pro eo videlicet quod cum præd. Willielmus Hester pater cujus Hæres præd. Willielmus Hester filius modo est, in vita sua, videlicet, octavo die Martii, Anno Regni Domini Jacobi II. nuper Regis Angliæ, &c. Tertio apud London videl't in Paroch. Beate Mariæ de Arcubus in Warda de Chespe, per quoddam scriptum suum obligatorium sigillo ipsius Willielmi Hester patris sigillat. Curique dicti. Dom. Regis nunc hic osten. cujus dat. est eisdem die & Anno cognovit se teneri & firmiter obligari præfat. Georgio Redshaw in vita sua in præd. mille libris solvend. eidem Georgio

gio

quo Redshaw Executoribus vel Administratibus suis cum inde requisitus esset & ad exhibendum sollicitus bene & fideliter faceret. præd. Willielmus Hester pater in vita sua obligavit se & heredes suos firmiter per idem scriptum obligatum præd. tamen Willielmus Hester pater in vita sua ac post. Will. Hester filius & heres ejusdem Will. Hester patris post ipsius Willielmi Hester mortem licet sepius requisitus. &c. præd. nullo libens præstet. Georgio Redshaw in vita sua seu præf. Christofero & Anne vel eorum alicui post ipsius Georgii mortem nondum solverunt nec eorum alter solvit sed ill. præfat. Georgio in vita sua & præfat. Christofero & Anne post ipsius Georgii mortem huicq; solvere omnino contradixerunt & præd. Willielmus Hester filius Christofero & Anne adhuc solvere contradicit ac injuste detinet ad damnum ipsorum Christoferi & Anne totum librum & inde præd. sectam, &c. & præf. hic in Curia iudem Christoferus & Anna literis Testamentar. præd. Georgii per quas satis liquet Curia dicti Domini Regis nunc hic ipsos Christoferum & Annam fore Executors Testamenti præd. Georgii præd. & inde habere Administrationem, &c.

Et modo ad hunc diem scilicet diem veneris prox. post. Cæstini. Sancte Trinitatis isto eodem Termino usq; quem diem præd. Willielmus Hester filius habuit dictum ad Billam præd. interloquuti & tunc ad respondend.

&c. ven. tunc præd. Christoferus & Anna per Attorn. suum præd. quem præd. Willielmus Hester filius per Willielmum Turbil. Attorn. suum & idem Willielmus Hester filius defend. vim & injur. quando, &c. & dic. quod ipse de debito præd. ut filius & heres præd. Willielmi Hester patris sui oderari non debet quia protestando quod scriptum obligatorium præd. non est factum præd. Willielmi Hester patris sui pro placito idem Willielmus Hester filius dicit quod ipse non habet nec die exhibitionis billæ præd. vel unquam postea habuit aliquas terras sive ten'ts per descensum hereditarium de præd. Willielmo Hester patre suo in feodo simplici & hoc parat. est verificare unde petit iudicium si ipse idem Willielmus Hester filius de debito præd. virtute scripti obligatorii præd. ut filius & heres præd. Willielmi Hester patris sui onerari debeat, &c.

Et præd. Christoferus & Anna dicunt quod ipsi per aliqua per præd. Willielmum Hester filium superius placitando allegat. ab actione sua præd. inde versus eum habend. precludi non debeant quia dicunt quod præd. Willielmus Hester pater post 25 diem Martii, Anno Dom. 1692. scilicet 27 die Novembris, Anno Regni Dom. Williel. tertii nunc Regis Angliæ, &c. quinto, apud London præd. in Parochia & Warda præd. obiit quodq; præd. Willielmus Hester filius post mortem præd. Willielmi Hester patris & ante exhibitionem billæ præd.

ante illud ad die Novembri
anno Regni Domini Willielmi
secundi anno Regni Anglie, die
quarta, inter diversos terras &
tenementa per Christofum filium
Willielmi patris Willielmi filii
Willielmi in feodo simplici unde
præfatus Georgio Redshaw in vi-
ta sua aut eidem Christofero &
Anne post mortem ipsius Georgii
de debito prædicti Willielmi possit
videlicet ipse London prædicti in
Parochia de Ward prædicti & hoc
prædicti sunt verissime unde per
iudicium & debent prædicti una
cum terris suis occasione di-
tentionis debiti illius sibi adju-
dicati, etc. & prædicti Willielmus
Hester filius dicit quod ipse de
debito prædicti ut filius & hæres
præfatus Willielmi patris sui de-
functi unum non debet illa di-
cit quod ipse prædicti Willielmus
ante exhibitionem billæ prædicti
scilicet die anno & loco in placito
ipsorum Christoferi & Anne su-
perius replendum placitum non
habuit terras vel tenementa per
desconsum hereditarium a præ-
dicto præfatus in feodo simplici unde
præfatus Georgio Redshaw in vi-
ta sua aut eidem Christofero &
Anne post mortem ipsius Georgii
de debito prædicti Willielmi possit
quia dicit quod bene & verum est
quod post 25 diem Martii, Anno
Domini 1672, scilicet 27 die No-
vembri, Anno Regni Domini
Willielmi secundi anno Regni An-
glie, etc. quarta, ipse London
prædicti in Parochia de Ward prædicti
præfatus Willielmus Hester post
sine obitu quod ipse prædicti Willielmus

post mortem præfati Willielmi
patris sui & hoc exhibuit
etiam ipse prædicti Willielmus
27 die Novembri, Anno & loco
supradicti, habuit terras & tenementa
per Christofum filium Willielmi de
prædicti Willielmi patris sui in
feodo simplici ad verum occu-
pantem hereditum et non aliter sed
prædicti Willielmus interius dicit
quod prædicti Willielmus post mortem
tempore mortis sue, scilicet 27 die
Novembri, Anno & loco supradicti
per diversa scripta obligaverit se & hæres
sue, in decem, sunt pro veris
et iustis debitis diversis personis
ad quam præfatus Georgio Red-
shaw, scilicet Johanni Letticeulster
M^r, Johanni Nicolls Ar^t, Pe-
tro Baldwyn & Anne Peachy
in diversis Denariis summis
in toto se attingen^t ad 800 l.
legalis monete Anglie, & quod
ipse prædicti Willielmus ut fi-
lius & hæres præfatus Willielmi
patris sui ut prædicti desinunt
postea, scilicet eodem 27 die No-
vembri, Anno & loco supradicti
prædicti 800 l. legalis monete
prædicti ad quam præfatus Georgio
Redshaw in executionem septem
hæres debentur facere prædicti &
ad prædicti Willielmi omnium ter-
rarum & tenementorum quocumque
quæ ad aliquod tempus ante ex-
hibitionem billæ prædicti ipse prædicti
Willielmus habuit per dictionem
sue hereditariam in feodo sim-
plici a prædicto præfatus Willielmo
sine obitu ad prædicti prædicti
veritate unde post Johanni
ipse prædicti Willielmus Hester fi-

(111)

tiff) recuperet debitum suum pro, so that he should be charged to pay the whole Debt, though nothing should be put in Execution but that single Acre.

But now this Statute hath made the Quantum of the Land material, for it provides, that the Debt may plead Riens per Descent at the Time of the Bill filed, and that the Plaintiff may reply, That he had Lands and Tenements from his Father before the original Writ brought; and if upon Issue joined it be found for the Plaintiff, the Jury shall enquire of the Value of the Land descended; and if sold before the Action brought, Execution shall be taken out against the Debt to the Value of the Land so sold by him, as if it had been his proper Debt.

Cases in Law
and Equity,
18, 19.

Now this Replication is not agreeable to the Statute, because the Plaintiff hath made the Value of the Land Part of his Plea; for he saith, That the Defendant hath such Lands, unde debitum prodest satisfecisse potuit; and put himself upon the Judgment of the Court.

But the Replication directed by the Statute is, That the Defendant had Lands and Tenements by Descent before the original Writ brought, which should have been tried by a Jury, who upon finding the Land descended, are ex Officio to enquire into the Value.

The Plaintiff hath alleged, That the Lands thus descended were to the Value of the Debt; Now if the Jury should find that they were not half of that Value, this would satisfy his Plea; and yet if such Pleading should be allowed, he would recover even upon a Plea that was false, for the new Statute provides, that he shall recover to the Value of the Land sold.

Econtra, The Inconveniencies which were at Common Law, and which are now remedied by this Statute, are as follow:

1. In Point of Time; for if the Debt had assented before Process issued against him, this Plea of Riens per Descent had been good, and the Plaintiff could not have recovered his Debt.

But this is now prevented; for if the Debt sell any Lands, which by Law were liable to the Debt of his Ancestors before any Action brought against him, yet he shall be answerable to the Value of the Land so sold.

2. If before the Action brought he had sold all the Lands descended to him but one Acre, and upon Riens per Descent pleaded,

ed,

a tempore ejus contrariam me-
moriam habere non existit ha-
betur ad consuetudinem quod Ju-
sticiarii ad inquirend. & presten-
tari. et quod ad Curiam Lete & visum
Franci plegi illi pertinebant
omnes & junct. ad Curiam visum
Franci plegi Manerii pnd. tunc
apud Manerium illud infra Men-
sem prox. post Festum Sancti
Michaelis Archangeli amantem
elegantur & a toto tempore su-
pra dicto eligere consueverunt &
cum Manerium pnd. de in-
habitant. infra manerium pnd. fo-
re Constabular. Constabularius
[Anglice the Constabularius]
de Shewston pnd. pro uno Anno
in Officio illi deservitur. qui qui-
dam homo se alio. Officiarius il-
lus super se suscepit & a toto
tempore supra dicto suscipere nunc
est & consuevit & Sacramentum
pro debita executione Officii il-
lus possedit & possidet conse-
vit. Quod pro rationabili per-
sona tempore supra dicti per
pnd. ad hujusmodi Curiam
Lete & visum Franci plegi in ea
parte inposit. & ibidem Josephus
& Johannes ultimus dicunt quod
pnd. Rolandus Dom. Manerii
pnd. existit. ac de eadem in for-
ma pnd. fuit. ad Curiam Lete
sive visum Franci Plegi Manerii
illius apud Manerium illud in-
fra Mensem prox. post Festum
Sancti Michaelis Archangeli fuit
nono die Octobris, Anno Regni
Dom. Willielmi octavi nunc Regis
& Dantis Maris imper Regis
Anglie, &c. quare, coram Hen-
rico Frithgen. ad tunc Seneschal-
lo ipsius Rolandi Capiti illi tunc

pnd. Jacobus Fletcher tunc de
die ante inhabitans infra Man-
erium pnd. fuit apud Shewston
pnd. & idem homo existit
fore Constabular. pnd. Constabularius
[Anglice the Constabularius]
de Shewston pnd. per Edwardum
Thorleton, Thomam Crick, Jo-
hannem Cook, Josephum Altop,
Jacobum Standley, Willielmum
Milner, Willielmum Ridding, Mi-
chaelem Wiat, Thomam Salt,
Jacobum Milner, Johannem Sil-
vester, Johannem Adcock, & Jo-
hannem Dickeson, probos & lega-
les homines & inhabitantes infra
Manerium pnd. ac ad tunc & ibi-
dem in eadem Curia jurat. & con-
fite. ad inquirend. & presten-
tari. et quod ad Curiam Lete & visum
Franci plegi illi pertinebant de-
bitis modo & secundum consue-
tud. elect. fuit fore Constabular.
Constabularius [Anglice the Constabularius]
de Shewston pnd.
pro uno Anno tunc prox. sequen-
tis in officio illi. servitur. & jurator
ill. ad tunc & ibidem in eadem
Curia ordinaver. quod idem Ja-
cobus prestaret. Sacramentum
suum pro debita executione of-
fici sui pnd. sub potestate foris-
dend. 40s. unde pnd. Jacobus
Fletcher statim postea fuit ei-
dem die & Anno ibid. Statim
habuit idem tunc Jacobus non
possedit Sacramentum suum pro
debita executione Officii Constabular.
pnd. tunc Officiarius illud
executus fuit su super se suscepit
fuit illi. et tunc ad tunc & in-
pos. postea illud pnd. recu-
avit per quod pnd. & ante
tempus quo, &c. scilicet ac Cu-
riam

riam Lete five visum Franci plegii
 pred. Maneri dicti Rolandi
 apud Manerium illud infra Man-
 erium pro. post Festum Sancti
 Michaelis Archangeli, videlicet un-
 decimo die Octobris, Anno Reg-
 ni dictorum Domini Regis &
 Domine Marie super Regine
 Anglie Sexto, coram prefat. Hen-
 rico Frith tunc Seneschallo, ipse
 Rolandi Curia ill' tunc per Ed-
 wardum Thorne-ton, &c. probos
 & legales Homines adunc Inha-
 bitantes infra Manerium pred.
 adunc & ibidem in eadem Curia
 jurat. & orent. ad inquirend. &
 presentat. ea que ad Curiam
 Lete five visum Franci plegii ill.
 pertinebant presentat. fuit quod
 pred. Jacobus Fletcher eo quod
 ipse debite fuit electus fore Con-
 stabulum Constabularius [Anglica
 the Constabularius] & Shew-
 son pred. ad ultimam Letam
 pro Manerio pred. venit & sub
 pena 40 s. super eum imposita
 coactus. fuisse officium illud su-
 per se suscipere ac ill. cuicunque & si-
 crimentum suum in forma pred.
 prestat. pro debita executione
 officii illius que vel aliquod in-
 de ille non fecisset Ideo ipse so-
 ruitur Domino Maneri pred.
 dictis 40 s. de pena pred. tunc
 Domino Maneri pred. solvend.
 prout per Record. inde penes di-
 ctum Seneschallum Curie Ma-
 nerii ipse Rolandi pred. apud
 Manerium ill. nunquam planius
 apparuit & quia pred. 40 s. de
 pena pred. illi eidem Rolando
 Domino Maneri pred. ut pre-
 stat. existit. pred. tempore
 quo &c. retro fuer. non soluit

idem Josephus & Johannes ut
 Ballivi ipsius Rolandi bene cog-
 noscant Caption. equis pred. in
 pred. loco in quo, &c. & ju-
 ste, &c. pro eisdem 40 s. de po-
 na five Amerciamento pred. pre-
 stat. Rolando sic retro existit.
 non soluit & infra Manerium
 pred. &c.

Et pred. Jacobus dicit quod
 per aliquam per pred. Josephum &
 Johannem superius in cognitione
 pred. placitando allegat. iidem
 Josephus & Johannes Caption.
 equis pred. in pred. loco, &c.
 justam cognoscere non debent
 quia dicit quod placitum pred.
 per ipsos Josephum & Johannem
 modo & forma pred. superius
 placit. materiamque in eodem
 content. minus sufficient. in lege
 existunt ad Captionem equis
 pred. in predicto loco in quo,
 &c. justam cognoscere quodque
 ipse ad cognitionem ill. modo &
 forma pred. fact. & placit. ne-
 cesse non habet non per legem
 terra tenetur respondere & hoc
 parat. est verificare unde pro de-
 fectu sufficientis placiti in hac
 parte idem Jacobus petit judici-
 um & damna sua occasione cap-
 tionis & injuste detentionis equis
 pred. sibi adjudicari, &c.

Et pred. Josephus & Johannes
 dicunt quod placitum pred. per
 ipsos Josephum & Johannem mo-
 do & forma pred. superius pla-
 citat. materiamque in eadem con-
 tent. bonum & sufficient. in lege
 existunt ad ipsos Josephum & Jo-
 hannem caption. equis pred. in
 pred. loco, &c. justam cognos-
 cere quod quidem placitum Ma-
 teriamque

teriamque in eodem content. iidem Josephus & Johannes parit. sunt verificare & probare prout Curia, &c. & qui pced. Jacobus ad cognitionem ill. non placuit seu respond. nec ill. sineusque aliquoties dedit. iidem Josephus & Johannes petunt iudicium & return, equas pced. una cum damnis missis & custagiis juxta formam Statuti in hujusmodi Casu

edit. & provisi sibi adjudicari, &c. sed quis Curia dicti Dom. Regis nunc hic de iudicio suo de & super premisis reddend. nondum advisatur dies inde dat. est partibus pced. coram Domino Rege usque a die ubique, &c. iudicio suo de & super premisis ill. audiend. eo quod Curia dicti Dom. Regis nunc hic inde nondum, &c.

Fletcher versus Ingram.

IN Roplechin sq taking a share at Shewston, in a certain Place called the Lane.

The Defendants made Cognizance to Bailiffs of one Rowland Freth, Lord of the Manor of Shewston, whereof he was seized in Fee, &c. Then they alleged a Prescription to hold a Court Leet there, within a Month after Michaelmas every Year; and they set forth a Custom within the said Manor, to elect a Constable at the said Leet out of the Inhabitants there, which Person so elected, had then to take upon him that Office, under a reasonable Penalty in that behalf, to be imposed by the Jury.

That the Plaintiff at a Court Leet held for the said Manor, was elected Constable by the Jury: That he was ordered to take upon him the Execution of that Office, under the Penalty of 40s. which he neglected to do: That this neglect was presented at the next Court, by which the Plaintiff had forfeited 40s. to the Lord of the said Manor; for which the Distress was taken, &c.

The Plaintiff demurred to the Cognizance, and the Defendants joined in Demurrer.

The Exceptions taken to the Cognizance were,
1. That the Defendants have not possession to any Right in the Lord of the Leet to distress for an encroachment, being a private Benefit to him, and which he cannot take without a Prescription to the Distress.

2. The Jury ordered him to take his Oath generally to execute the Office of a Constable, but doth not say, he was summoned to appear before a Justice of Peace for that Purpose, or before whom, or where he should come to take his Oath.

3. He

S. C. 1 Salk.
175.

1 Salk. 175,
380.
Comberb. 350,
351.
Ante 95.
2 Rol. Rep. 3.
8 Co. 38. b.
Skin. Rep.
635, 636.

11 Rep. 44. b.
Cro. Eliz. 673.
Comber. 416.

2 Jo. 301.
1 Salk. 56.
Pirgib. 46.
108, 109.
Hob. 129.
Mod. Cases in
Law and E-
quiry, 1st Pt.
300, 301.
Comber. 415.
8 Rep. 38. b.
41.
12 Co. 43, 44.
Carrh. 28.
Pal. 7.
Cro. Eliz.
241, 581.
2 Rol. Rep. 3.
1 Rol. Rep.
201.
Cro. Jac. 382.

1771 218
1772 218
1773 218
1774 218
1775 218
1776 218
1777 218
1778 218
1779 218
1780 218

Co. Lit. 208.
6 Co. Rep. 31.

He doth not say, that the 40s. imposed on him for not taking upon him the Office, was a reasonable Point.

As to the first Objection: It is true, this is an Assessment which differs from a Fine, the first being always assessed by the Jury, and the other by the Court; and though it is a Thing of less Nature than a Fine, yet a Distress may be taken for it, without a Custom alleged to be so: And this is the Resolution in *Grady's Case*.

As to the second Objection: The Defendants have alleged a Custom, every Year to choose a fit Person at the Court-Leet to be Constable for that Year, and that the Plaintiff was elected Constable, which is a sufficient Obligation for him, under a Pain, to come and take upon him the Office; and it is also alleged that he had Notice, so that the Custom of the Place operated upon him, which he is bound to obey. But the administering the Oath is subsequent to the Election, and he is thereby bound to be all reasonable Acts to qualify himself to take the Oath upon him, though usually the Sheriff certifies to a Justice of the Peace, and if the Party refuse to take upon him the Office, the Justice usually sends his Clerks to compel him.

As to the last Objection: The Law ought to judge, whether the Plaintiff imposed on him be reasonable or not; and the answering it to be reasonable, will be of little Use if the Court should be of another Opinion.

In Hilary Term following, this Case was argued again, and it was objected, that it was an unreasonable Custom, and therefore void.

As to the Reasoning of the Case when the Plea shall begin to take upon him the Office, and when the Court takes the Election of a Freeman in Fee for Payment of a Sum of Money, and he takes Oath for the Payment, there the Obligor hath Time during his Life to be so; and this being a Custom against Common Law, it must be taken away.

to which it was answered, that the Time was certain enough, for the Plaintiff was to hold the Office pro anno Anno integro proxi sequenti: that Day adjourned the Court was held.

But it is as certain, as where a Custom hath been assigned for a Copyholder, to pay a Year's value of the Land upon an Assize; and yet such a Custom hath been held good, because the Value may be valued in a Certainty.

So where a Custom was, that the Surrendree shall come and be admitted after three Possessiondays, notwithstanding that the Copyhold should be forfeited. The Surrendree died, his heir within Age, who refused to be admitted; it was held, that the Lord might seize quousque the Infant came of Age, which is as uncertain as this, for the heir may die before that Time.

So where a Man is beyond Sea, it is uncertain when he may return, and yet his Right is saved by that Means.

Slid. Rep. 148,
249.
Comb. 43, 44.
Perkins ver.
Tims.
Carth. 12, 13.
King versus
Dillison.
Comb. 118,
119.

2 Cro. 226.

2. The fact, that the Plaintiff was to take an Oath duly to execute the Office, but hath not appeared before whom he should take it, nor from whom he should accept it; and so not like *Gri-
dy's Case, for there the Custom was said to choose a Constable within a Month after Michaelmas, to hold the Office for one Year next following; and that if the Person was present in Court, that he ought to be sworn by the Steward, so that not only the Time, but the Person before whom the Oath should be taken is ascertained, which is wholly omitted in this Case.

* 8 Rep. 38.

This Objection was thus answered, (viz.) That 'tis true, where a Man is obliged to do an Act, it must appear to the Court that 'tis possible for him to do it; but that the Court will take Notice without setting it forth, that a Steward of a Lord during the Time he holds the Court, may give an Oath to a Constable, as well as a Justice of Peace after the Court is adjourned.

3. It hath not appeared that the Plaintiff was summoned to the Leet, or that he had any special Notice that he was chosen Constable; but only generally, that Notitiam habuit, which is not sufficient; and for this Reason an Indictment was quashed in this Court, which set forth, that the Defendant was fit to be a Constable, that he was debito modo Electus; and that he had Notice of it, but did not take the Oath, &c. and because it was not said that he was summoned before a Justice of Peace for that Purpose, the Indictment was quashed.

Trials. 7 Will.
Rex ver. Har-
per.

4. It was also objected, that the Plaintiff was not sworn by the Steward of the Lord, or by a Justice of Peace, as required by the Custom, but only by the Sheriff, which was answered, that the Sheriff is a Justice of Peace, and may give an Oath to a Constable.

To

It was objected, That by alleging *Notitiam habuit*, it must be intended that he had legal Notice, because the Law requires him to take the Oath before the Steward of the Leet, as a Justice of the Peace.

Alaya 178.

In *Prigg's Case*, who was indicted for that he being chosen Headborough, refused to take the Oath to execute that Office; there is no mention of Notice or Summons before whom to appear for that Purpose; but a Writ was granted by B. R. directed to him, commanding him to go before a Justice of the Peace to take it.

Defence, He alleged in this Cognizance, That the Plaintiff *Statim posuit ibidem Notitiam habuit*, which *Alaya ibidem* is a Relative, as well in a legal as grammatical Construction, and must refer to the Court, being the Place where he was chosen Constable.

4. It was objected, That there was not a Custom alleged, to make any Distress for this Penalty: And though it may be true that a Man may distrain for an Amercement, and for a fine in a Leet, without alleging a Custom, yet for such an extraordinary Thing as this, there must be a Custom expressly laid to distrain, &c.

Godfrey's Case, 11 Rep. 43.

Thus where a Custom was alleged to swear twelve Men, to enquire into the Articles given in Charge at a Court-Leet, and that the Men so sworn had used (inter alia) to present themselves to pay to the Lord of the Leet 10s. pro certa Lete, for which the Steward distrains; but it was held unlawful, because it being for the particular Benefit of the Lord, and against common Right, he cannot justify the taking a Distress without a Prescription, as he may for a fine or Amercement.

This Objection was answered by the Counsel, that a Distress is incident, as well for a Penalty, as for a fine or Amercement.

*8 Co. 39.
11 Co. 43.
1 Rol. Rep. 73.*

Curia. The Steward may impose a fine upon a Person who is elected by the Burgage, if he is present at the Leet, and refuses to be sworn to execute the Office; but if the Person is not present, the Steward cannot fine him, but he may be amerced, which must be presented at the next Court, and assessed; and after the Court is over, the Justice of Peace may administer the Oath of Constable by the Power which they have as Conservators of the Peace, which Power they had at Common Law, and is now vested in them, and the rather because a Constable is but a subordinate Officer to them, for the Preservation of the Peace.

But

And the Party ought to be summoned, and a Time and Place ought to be appointed under a Penalty when and where he shall come, and before whom to take the Oath; and therefore Notitiam habuit generally is not enough, for the he is an Inhabitant: per he may be refused: And therefore for want of alleging special Notice, Judgment was given for the Plaintiff.

Leaves ver. Bernard. Mich. 7 W. 3. Rot. 41.

THE Plaintiff declar'd, That in Consideration he had paid to the Defendant sixteen Guineas, he promised to pay the Plaintiff 100 l. if no Colon in Flanders garrisoned with 2000 Men, should be taken or surrendered to the French King before the first Day of September 1695. and lays an Indebitatus assumpsit for the 100 l. upon a Vager, and another Indebitatus for the 100 l. received by the Defendant for the Use of the Plaintiff, to which the Defendant pleaded thus:

Et modo ad hunc diem scilicet diem Veneris prox. post Crast. Sanctæ Trinitatis isto eodem Termino usque quem diem præd. Isaacus Bernard (salvis sibi omnibus & omnimodis exception. quoad Billam præd.) habuit licentiam ad Billam interloquendi & tunc ad respondend. &c. coram Dom. Rege apud Westm. ven. tam præd. Johannes Leaves, per Attorn. suum præd. quam præd. Isaacus per Johannem Bernard Attorn. suum & idem Isaacus defen. vim & injur. quando, &c. & petit judicium de Narratione præd. quia quoad primam promissionem & assumptionem superius in Narratione illa mentionat. idem Isaacus dicit quod præd. Johannes Leaves valorem præd. sexdecim peciarum Auri cuneat. per ipsum Johannem Leaves, eidem Isaaco ut præfertur solv. supposit. in narratione sua præd.

in certo monstrare & allegare per legem terræ tenetur & debuisset unde ex quo præd. Johannes Leaves, verum valorem sexdecim peciarum Auri cuneat illius superius non monstravit seu allegavit idem Isaacus petit judicium de Narratione præd. quoad primam promissionem & assumptionem præd. & quod Narratio illa in ea parte Cassetur, &c. & quoad secundum promissionem & assumptionem præd. superius in Narratione ipsius Johannes Leaves mentionat. idem Isaacus similiter petit judicium de Narratione illa quia præd. Johannes Leaves in narratione sua præd. non ostendit de vel pro quibus pignoribus in eadem promissione & assumptione superius express. fact. fuisset inter eundem Johannem Leaves aut Isaacum, aut qualiter vel in quo modo præd. Johannes Leaves, pignus ill. de eodem Isaaco habuisset

confet prout per legem suam
obstant debet in quod Cu-
ria Dom. Regis hic opponit
verum pignus prout. sicutum seu
illiusum fuisse unde ex quo
præd. Johannes Leaves, ill. Cu-
ria Dom. Regis hic non ostendit
seu demonstravit id. Isaacus petit
iudicium de Narratione præd.
quoad præd. secundam promissio-
nem & assumptionem & quod Nar-
ratio ill. in ea parte Cassetur,
&c. & quod tertiam promissio-
nem & assumptionem præd. supe-
rius in Narratione ipsius Johan-
nis Leaves mentionat. idem Isaacus
similiter petit iudicium de Nar-
ratione præd. quia dicit quod

ecce in libro in eademertia
promissione & assumptione supe-
rius supra. sicut. non est verum
liber in secunda promissione &
assumptione præd. superius in
Narratione ipsius Johannes Leaves
similiter mentionat. & express.
& non al. neque diversa & hoc
parat. est verificare nōde ex quo
præd. Johannes Leaves un. & ean-
dem denariationem summam in una
& eadem Assione hic petit idem
Isaacus similiter petit iudicium de
Narratione præd. quoad tertiam
promissionem & assumptionem & quod
Narr. in ea parte similiter Cassetur,
tur, &c.

Conclusion of
the Plea.
Vide post.
146.
6 Mod. 102.
1 Lut. 42.

It was objected against this Form of Pleading, That it was
neither a Demurrer, or a Plea in Bar, and therefore it must
be a Plea in Abatement, and so an Judgment final could be
given, but a Respondens ouster.

1. It cannot be a Demurrer, for that is where the Party
will go no farther, because the other hath not shewed sufficient
matter against him, and therefore he saith, that Narratio minus
est sufficiens in lege to make him give any Answer thereto:
whereupon he prays the Judgment of the Court if he shall be
compelled to answer. All which saym is wanting in this Plea.

2. It cannot be a Plea in Bar to the Action, for then he should
have pleaded, That the Plaintiff Actionem suam against the De-
fendant habere non debet; and concluded his Plea thus, (viz.)
Unde petit iudicium si præd. (the Plaintiff) Actionem suam præd.
inde versus (the Defendant) habere seu manutenere debeat, &c.

3. Therefore it must be in Abatement, and that is either to the
Cause or Count, if the Action is brought by Original, then the
Plea is petit iudicium de Breve, and it must conclude in the same
Words, if tis to the Declaration, then it must be petit iudicium
de Billa & Narratione, for Bills and Narratio are the same, and in
this saym the Defendant hath not pleaded.

The first Case that such Uncertainty of Pleading was introduced, was in the second Year of Car. 2. where the Defendant began his Plea in Ten, (viz.) *Actio non*, &c. and concluded in Abatement, (viz.) *Unde pro defectu sufficientis Narrationis*, &c. per judicium; but all the other Entries are otherwise.

2 Saund. 128.

But the Court was of Opinion, that the substantial Part of a Defence was in this Plea, and therefore the Defendant had Judgment.

Smith versus Sharp.

S. C. 1 Salk.
139.

WRIT of Error upon a Judgment by Default in an Action of Covenant upon Articles, &c. wherein the Defendant admitted, that he or his heirs would convey the Acres of Land, &c. to the Plaintiff, by his Assigns; and farther covenanted, that he would offer unto the Plaintiff a good Conveyance for the assuring the said the Acres to him or his Assigns; and the Breach assigned was, that he had not executed a Conveyance to the Plaintiff himself, and takes no Notice of his Assigns; and for this Reason it was objected, that the Breach was not well assigned, for if it had been conveyed to his Assigns, the Covenant had been performed.

Carth. 125,
197.
Mod. Ca. in
Law and Equ.
1. Part 231.

As for Instance: A Covenant was made by the Plaintiff, That he, his Executors, or Assigns, would repair, &c. the Breach was, That neither he, his Executors and Assigns, had repaired; and upon Demurrer it was held to be ill, because he ought to have assigned the Breach in the Disjunctive according to the Covenant.

Cro. Eliz. 348.

In the Principal Case, the Declaration was held good, for there is a Difference where a Thing is to be done by a Person, or his Assigns, and to a Person or his Assigns: For in the first Case the Breach must be assigned, that it was not done either by the one, or the other; but in the last Case it will be intended prima facie, to be done to the Person himself; but if he assign his Interest, then it may be done to the Assignee. Whereupon Judgment was given for the Plaintiff.

Taylor versus Baker.

Staff. ff. **M**emorandum quod alias
scilicet Termino Pas-
cali, præterit. coram Dom. Rege

apud Westm. ven. Henricus Tay-
ler per Nathan Hickman Attorn.
suum, & protulit hic in curia dict.
M m Dom.

Dom. Regis tunc ibidem quandam Billam suam versus Johannem Baker in Custod. Mar. &c. de placito transgressionis super casum & sunt pleg. de prof. scil't Johannes Doe & Richardus Roe que quidem Billa sequitur in hæc verba.

Staff. fl. Henricus Tayler queritur de Johanne Baker in Custod. Mar. Marefc. Domini Regis coram ipso Rege existen. pro eo videl't quod cum præd. Henricus 21^o die Maii, Anno Reg. Dom. Will. Tertii nunc Regis & Dom. Mariæ nuper Reginæ Angliæ sexto, apud Swinford Reg. in confid. quod idem Henricus servus ipsius Johann. fuisset & ipse in labore Aurigæ ac in laboribus & operibus agriculturæ & agricolæ pro spacio octodecim mensium ante idem tempus bene & fideliter servisset ipse idem Johannes super se assumpsit & eidem Henrico adtunc & ibidem fideliter promissit quod ipse id. Johannes tant. denariorum summas quant. idem Henricus pro laboribus & serviciis suis tempore perform. eundem habere mereatur eidem Henrico cum inde postea requisit. esset bene & fideliter solvere & contentare vellet & idem Henricus in facto dicit quod ipse pro laboribus & servicio suis sicut præfertur per ipsum pro eodem Johanne factis habere meruit sex libras legalis monete Angliæ unde idem Johannes postea apud Swinford Regis præd. notitiam habuit, cumque etiam præd. Johannes vicefimo octavo

die Maii, Anno sexto supradicto, apud Swinford Regis præd. infimul computasset cum præfat. Henrico de diversis aliis denar. summis eidem Henrico per præfat. Johannem ante idem tempus debet. & adtunc in arresto & insoluto existen. pro diversis aliis operibus & negotiis per ipsum Henricum pro eodem Johanne ante tempus illud performat. & super Compo. ill. præd. Johannes invent. fuit in arceragiis erga eundem Henricum in al. summa quinque librarum bonæ & legalis Monete Angliæ, & præd. Johannes in consideratione inde super se assumpsit & eidem Henrico adtunc & ibid. fideliter promissit quod ipse idem Johan. præd. quinque libras eidem Henrico cum inde postea requisit. esset bene & fideliter solvere & contentare vellet, Quæ quidem summae in toto se attingunt ad undecim libras præd. tamen Johannes separat. promissio. & assumptiones suas præd. minime curan. sed machinan. & fraudulenter intend. eundem Henricum in hac parte callide & subdole decipere & defraudare præd. separat. denar. summas sep. aliquem inde denar. eidem Henrico non solvit nec aliquatiter pro eisdem contentavit licet ad hoc facien. præd. Johannes postea, scil't. primo die Februarii, Anno sexto supradicto, apud Swinford Regis præd. in Com. præd. & sæpius postea requisit. fuit sed ill. ei hucusq. solvere seu aliquatiter pro eisd. contentare omnino recusavit & ad-

huc

huc recusat ad damnum ipsius Henrici viginti librarum & inde producit sectam, &c.

Et modo ad hunc diem scilicet diem Veneris prox. post Crastinum Sancte Trinitatis isto eodem Termino usque quem diem præd. Johannes habuit licentiam ad Billam præd. interloquen. & tunc ad responden. &c. coram Dom. Reg. apud Westm. ven. tam præd. Henricus per Attorn. suum præd. quam præd. Johannes per Ric'm Longford Attorn. suum & idem Johannes defen. vim & injuriam quando, &c. & dicit quod præd. Henricus actionem suam præd. inde versus eum habere seu manutenere non debet, quia dicit quod post confessionem præd. separal. promission. & assumption. in narr. præd. mentionat. scilicet eodem 21 die Maii, Anno regni dictorum Dom. Regis & Dom. Regine sexto, apud Swinford Regis præd. concordat. fuit inter præd. Henricum & eundem Johan. quod præd. Henricus acceptaret & dicit. Johannes daret eidem Henrico quandam Billam sub manu sua ipsius Johannis pro solutione summæ quinque librarum eidem Henrico ad festum Sancti Mich. Archang. tunc prox. sequen. in plena satisfactione & exoneratione omnium denariorum summarum eidem Henrico a præfat. Johanne debit. & superinde ipse præd. Johannes adtunc & ibidem dedit eidem Henrico quandam Billam sub manu ipsius Johannis, & per eadem Billam cognovit se debere & stare indebitat. eidem Henrico summam 5 l. solven. ei-

dem Henrico ad festum Sancti Mich. Archang. tunc prox. sequen. ad quam quidem solutionem bene & fideliter faciend. idem Johannes obligavit se & heredes suos per eandem Billam quam quidem Billam ipse præd. Henricus adtunc & ibidem cepit & acceptavit in plena satisfactione & exoneratione præd. separal. promission. & assumption. ipsius Johannis in narratione præd. mentionat. & hoc parat. est verificare unde petit judicium si præd. Henricus actionem suam præd. inde versus eum habere seu manutenere debeat, &c.

Et præd. Henricus dicit quod ipse per aliqua per præd. Johannem superius placitan. allegat. ab actione sua præd. inde vers. eum haben. præcludi non debet, quia protestando quod non concordat, fuit inter præd. Henricum & Johannem quod præd. Henricus acceptaret & dicit. Johannes daret eidem Henrico Billam in placito præd. mentionat. sub manu ipsius Johannis pro solutione summæ quinque librarum eidem Henrico ad Festum in eodem placito specificat. in plena satisfactione & exoneratione omnium denariorum sum. eidem Henrico a præfat. Johan. debit. protestando etiam similiter quod præd. Henricus non cepit & acceptavit Billam præd. in plena satisfactione separal. promission. & assumption. ipsius Johannis in placito præd. si'liter mentionat. prout præd. Johannes superius inde placitando allegavit pro placito idem Henricus dicit quod præd. Johannes non

non sedit prefat. Hanc alii-
quam Billam sub reatu & sigillo
fictis Johannis pro solutione de-
narium in placito prefat. men-
tionat. & hoc patet est verificatio
unde petit iudicium & dampna

in occasione non perform. pro-
mission. & assumption. pred. sibi
adjudicari, &c.

**Demurres, and Joinder
in Demurres.**

Taylor versus Baker.

Quantum meruit pro opere & servitio, and an Infam. compul-
sion for the Pound, solvend. cum inde requisit. offer.
The Defendant pleads, that it was agreed between him
and the Plaintiff, that the Defendant should give, and the
Plaintiff should accept a Bill of 5 l. in Satisfaction of what
was due to him, and that he did accept such a Bill according to
the said Agreement.

The Plaintiff replies, Protestando that he made no such Agree-
ment; Protestando etiam, that there was no such Bill given;
Pro phicod. dicit, that it was under Seal; and upon Demurres
to this Replication, it was held good.

Ante 86.

Vide post. 145;
145.
S. C. &
1 Salk. 298.
Powers ver.
Clerk.

Bowers & Uxor ver. Cook Executrix, &c.

DEBT against the Defendant as Executrix, &c.
The pleader, that her Husband died Intestate, and that
the Archbishop of Canterbury committed Administration to her;
Cujus preterea the said Defendant administered to the Goods and
Effects of John Cook her Husband, unde petit iudicium, &c.

And upon Demurres to this Plea, the Question was, Whe-
ther she should not have traversed, that she was Executrix, or
ever administered as Executrix?

If the Plaintiff in this Case had replied, that she administered
de son Tort, and the Defendant had demurred, Judgment should
be given against him, because by the Demurres it is confessed
she was a wrongful Administrator, and therefore by her inter-
meddling with the Goods, an Advantage is given to the Credit-
ors to the her, either as Executrix or Administratrix, though in
Court she was not at that Time; but Administration was
committed to her afterwards. Now a wrongful Administration
shall never be intended, unless the Party acknowledges the in-
termeddling with the Estate.

Ca. in Law
and Equ. 301,
302, 323,
324.
Carth. 99,
100.
Cro. Eliz. 108,
810.
3 Leon. 197,
Chanc. Ca. 33.
1 Sid. 76.
5 Co. Rep.
30. b. 34.
3 Cro. 565.

It is true, in the Case of *Bradley and Keynall*, the Defendant's Plea went a little further; that was an Action of Debt brought against an Executor. He confessed, that some of the Inheritance Goods came to his Hands, and that afterwards Administration was committed to another, to whom he delivered the said Goods: Then in such Case he may be sued as Executor de son Tort, because he has once charged himself to the Plaintiff's Action, and therefore shall not be discharged by *Quare ex post Facto*.

The like Exception was taken to the like Plea, Anno 29 Car. 2. in the Common Pleas, and Judgment was given for the Plaintiff; not because the Plea was ill, nor for the Reason now alleged, but because it was a Plea in Abatement, and concluded in Bar.

Afterwards it was allowed in the principal Case, that the Plea was good, and that the Defendant need not traverse that he was Executor, or ever administered as Executor.

Rex versus Stocker.

S. C. 1 Salk.
342, 371.

THE Defendant was indicted for forging a Bill of Lading, and upon Demurrer to the Indictment, the Exception was:

It set forth, that the Defendant scienter & subtiliter, nequiter & falso, fecit & fabricavit, vel fieri & fabricari causavit quendam Chartam, videlicet, quendam Billam Exonerationis, cujus Tenor sequitur, &c. which is too incertain, for this being an Indictment at Common Law, it ought to have more Certainty; and tho' the Defendant hath demurred, yet nothing is thereby confessed but what is well pleaded: Besides, these are distinct Offences, and require several Judgments.

To which it was answered, that the Word Vel is only an Explanation of what went before, and makes it signify the same Thing.

As for Instance: The Statute 5 Eliz. enacts, That it shall not be lawful to exercise a Trade except he shall be Apprentice seven Years, under the Penalty of 40s. per Month. A Man was indicted on this Statute, for that he did exercise Artem five Mysteriorum, &c. and this was held good.

Curia. An Indictment setting forth, that the Defendant *murdravit, vel murdrari causavit*, is not good; for those are distinct Crimes.

N n

Cro. Eliz. 567.
Fide 1 Cro. 89.
3 Cro. 102,
406, 587.
Moor. 419.
5 Co. 34.
1 Mod. 70,
213, &c.

1 Mod. 213,
214.

See also 10
Mod. 213,
214.
10 Mod. 213,
214.

Mod. Cases in
Law and E-
quity, 329,
330.
Cases in Law
and Equity,
336.
Fide 414.
Fitzgib. 56,
57, 58, 59.

Hale's Pl. Cr.
ad Pr. 349.

5 Eliz. c. 4.

Charges, (viz.) but is the proper Act of the Party, and the other is not.

So in this Case, the Defendant might be shown upon the Statute was committed, and if so, it requires a Verdict Com-
bination in respect of the Fact.

It is true, in a new Statute, he was charged a Felony to be done, in a Felony Statute; but then it ought to be laid to in the Indictment.

If in an Action of Battery the Plaintiff should declare, that the Defendant verberavit, vel verberari curavit, the reading of it to be shown will not make him guilty of the Battery, for it is no more than a Circumstance.

In an Indictment, or Information, the Fact is never laid in the Declaration; and therefore an Indictment on the Statute 8 H. 6. for a forcible Entry into two Closets of Speeches, or Palace, was held void for the Uncertainty.

Co. Ent. 278.
2 Roll. Abr.
81.
Hawk. Pl. Cr.
1st Pt. c. 64.
§. 37.

Rex versus Gately.

*Per Recordum de Terminis Sancti Michaelis Anno septimo
Willielmi, &c.*

Midd. ff. Memorandum quod assignatus ordinatur per Curiam
ad general. Ses-
sionem Pacis Domini Regis ten-
pro Comitatu Midd. per Ad-
journalment. apud Wick's Hall
in St. John Street in Comitatu
præd. Die Veneris, scilicet, un-
decimo Die Octobris, Anno Reg-
ni Domini nostri Gulielmi Ter-
tii Dei Gratia nunc Regis An-
glia, &c. septimo, coram Ger-
man. Ireton Ar^s, Jacobo Mun-
dy Ar^s, Willielmo Underhill Ar^s,
Willielmo Wahers Ar^s, & aliis
Sociis suis Justiciariis dicti Dom.
Regis ad Pacem in Com. præd.
conservand^o, necnon ad diversas
Felonia, Transgressiones & alia
Misdemeanors in eodem Com. per-
petrat^o, audiend^o & terminand^o.

assign^o, ordinatur per Curiam
præd. prout sequitur, scilicet:

Whereas James Carty Esq^r,
One of His Majesty's Justices of
the Peace for this County of
Middlesex, upon Complaint made
by Robert Green, Apprentice
to Robert Gately, now of the
Parish of St. James Clerken-
well in the said County, and
late of London, Surgeon, by
Indenture of Apprenticeship,
bearing Date on or about the
22d Day of September, in the
Year of our Lord 1690, for the
Term of seven Years, from the
Date of the said Indenture, to
learn the said Art; That the
said Gately had not taught and
instructed

instructed him the said *Green* in the Art, Mystery, or Profession of a Surgeon, according to the Covenants in the said Indenture of Apprenticeship, but had altogether compelled him the said *Green* to be a Rope-Dancer, Tumbler, and Jackpudding. The said *James Gately*, upon Examination of the said Master, for want of good Conformity in the said Master, could not compound and agree the same; and therefore by Recognizance taken before him the ninth Day of September last, did bind the said *Gately* with Sureties to appear at this present Quarter Sessions to answer the said Complaint: Now upon Examination of the said Apprentice, upon Oath, and other Proof, it appeared to this Court, That the said *Roger Gately* had not taught and instructed the said *Green*, or caused him to be taught and instructed in the Art, Mystery or Profession of a Surgeon during the Time of his Apprenticeship, but instead thereof, had altogether compelled him to practise the Art and Employment of Rope-Dancing, Tumbling, and Acting

in a Jackpudding, on a Mountebank's Stage, and in Booths, in Fairs and Markets; and that the said *Gately* also had at several Times immoderately beat and misused his said Apprentice: And for that it could not be made appear to this Court, that the said *Gately* did either understand, practise or exercise the said Art, Mystery or Profession of a Surgeon, and upon a full Hearing of what was insisted on by Counsel on either Side; this Court, upon Consideration of the said Matter, doth think fit, and order, That the said *Edward Green* shall be, and he is hereby discharged from his said Indenture of Apprenticeship to the said *Roger Gately*; And the Justices of the Peace for this County, whose Hands and Seals are hereunto set (*quorum unus, &c.*) have declared, and do declare, That, for the Reasons aforesaid, they have discharged, and do discharge the said *Edward Green* from his said Indenture of Apprenticeship to the said *Roger Gately* accordingly.

Rex versus Gately.

S. C. 2 Salk.
471.

THE Order abovementioned being removed in B. R. by a Certiorari, several Exceptions were taken to quash it.

1. The Order is, That the Servant shall be discharged from his Master; but the Master is not discharged from his Covenants to the Servant; therefore the Order being not mutual, is void.

To

To which it was answered, That it is not necessary it should be mutual, for when the Servant is discharged, the other is no longer a Master.

13 Rep. 12.

Comber. 353,
354

2. The Statute never intended to give the Justices in Sessions a general Power to meddle with Masters in all Trades, but only in such which were then used in England, and therein particularly mentioned; and it provides, That if such Master (which must be in one of those Trades) shall misuse his Apprentice, then the Justices may interpose: But a Surgeon is not named in that Act, and it being a Penal Law, it shall not be extended according to Equity to comprehend any other Trade, but what is expressly named in the Act.

1 Samd. 317.
Vide 1 Mod. 2,
286.
1 Vent. 175.

This Objection was thus answered, (viz.) That a Surgeon is a Trade within the Statute, for it is a Manual Occupation, and that is particularly mentioned in the Act.

But it hath been held, that this Statute extends to more Trades than those mentioned in it; for the Apprentice of a Merchant hath been discharged from his Master by an Order of Sessions, and yet a Merchant is not named in that Act. Besides, it is not a Penal, but a Remedial Law, to regulate Masters and Apprentices.

Vide 1 Salk.
67, 68.
2 Salk. 471,
490, 491.

3. The Justices of Peace have no Authority to discharge an Apprentice, but where he was compelled by them to serve; and in such Case it is reasonable, that the Contracts which were made by their Authority should be dissolved by the same Power; but they cannot discharge any voluntary Agreements made between the Parties.

Cases in Law
and Equity,
68.
Carthew 156.

If they make an Order for the Payment of Servants Wages, it is good, because they have Power to compel the Service; but for the Wages of a Coachman, or the like, they have no Power to make an Order, because they cannot compel a Man to serve in that Capacity. One Roycroft, a Justice of Peace in Middlesex, made an Order for the Payment of a Seaman's Wages, and upon an Action brought against him, the Plaintiff recovered 30l. Damages.

2 Keble 822.
Skin Rep. 98.
Carthew 198,
366.

4. But if the Justices of Peace had any Power, they have not pursued it, for it doth not appear, that they who set their Hands and Seals to the Discharge were present in Sessions; and at the Examination of the Master, it being only set forth in the Order, That the Justices of the Peace of the County, whose

Danda

Pands and Seals are thereunto set, &c. and those may be Ju-
stices sitting out of Sessions.

Afterwards it being moved again, this Order was quashed for
the second and third Exceptions taken to it.

Stedman versus Page.

IN Reply to the Plaintiff's declared for taking Bail, &c.

The Defendant made Cognizance as Bailiff of one John
Bennet, and Grace his Wife; setting forth, That one Simon
Bennet was seized in Fee of the Lands in quo, &c. and being so
seized, made a Lease thereof to Griffith for forty-four Years,
reserving Rent; that Simon Bennet died, and the Lands descend-
ed to his Daughters and Coheirresses, one whereof married the
said John Bennet, and the other was the present Countess of Sa-
lisbury, and so made Cognizance for a Society of the Rent; and
upon Demurrer, Judgment was given for the Plaintiff, because
one Coparcener cannot make such an Avowry for a Society of the
Rent before Partition, tho' they have several Inheritances.

S. C. 1 Salk.
390.

Parceners
must avow
jointly.
1 Salk. 187,
390.

Comb. 347.
Cart. 364.

The King versus Hill.

Shower. **T**HO' the Statute of Recusancy saith, That an
Outlawry for Recusancy shall not be reversed for
want of Form; yet in Serjeant Trinder's Wife's Case, 1 W. & M.
you adjudged in this Court that it should, that the Statute may
be made Sense: But an Indictment or Information for Recu-
sancy shall not be quash'd for Form; but yet on Traverse of the
Fact, and Bail given, the Outlawry shall be reversed for Form,
Quod Curia concessit.

S. C. 1 Salk.
371.

Outlawry of
Recusancy
reversed for
want of Form.
Skin. Rep. 114.

Chief Justice. On the Reversal of an Outlawry, in an Infor-
mation for sending Children beyond Sea to be dyed Papists, the
Defendants must plead Instantly, & sic per *Astr.*

Chief Justice. **O** O. **R**efid.

But this is all Summery; the full and de-
claration are to be found in Summery.

Relid' ad Term. Sancti Michaelis 7 W. 3. in B. R. coram
Johanna Hale Mil' Cap' Just' & Sociis suis.

Prohibitory
Writ against
Players

THERE was a Prohibitory Writ issued out to the New Play-
ers, Betterton, &c. who had erected a Play-house in Little
Lincoln's Inn Fields. The Writ recited, that it was a nuisance
to the Neighbourhood, and therefore prohibited them to continue
it; and the Players not obeying this Writ, there was a Writ
made for an Attachment, Nisi, &c.

Shower. That no such Writ could be granted
by the Court, for that the Parties had no Day to defend them-
selves, which it were to come in and be examined upon Incontro-
vertibles upon Oath, and they would swear it was no Nuisance,
as appeared by several Affidavits (which he then showed) but he
said, that the most proper Method would be to proceed by Indis-
tinctum, then the Grand Jury, (viz.) the whole County, would
consider whether it were a Nuisance or not.

Prohibitions.

Chief Justice. You are not concluded by this Writ, as to the
Right; but you may come in and plead to this Attachment the
General Issue, and if the Thing be no Nuisance, it is no Fault
or Contempt to continue it. It is like the Case of a Prohibition
to the Ecclesiastical Court, you may make a Suggestion that the
Defendant has done contra Prohibitionem Regiam; upon
which, if there goes an Attachment, the Defendant may come
and take Issue, that he did not proceed after the Prohibition
granted.

1 Mod. 76.
Skim. Rep.
625 10630.

There was a Case in this Court of Jacob Hall, where the
Court had sent a Writ as this is here, and made him pull down
his Stage. But indeed, that of a Rope-dancer is a Nuisance
in se, but here it is only so in Consequence; for the sitting of
the Stage is only a Nuisance, as it hinders the People, and
the Court, and the Spectators.

Shower. The Law will not determine a Man's Right, but
by a Jury. The Writ de Leproso amovendo is a Writ of an
extraordinary Nature, and I think has not been granted these
hundred Years. But even in that Writ, the Sheriff is com-
manded to enquire by the Oath of twelve Men.

But

But besides, in this particular Case, the Prosecution is carried on by the Patentees of the Old Play-house, and not by the Inhabitants; which shews they do not think it a nuisance, if it be one: And in Truth, the Question at last will be, whether those Letters Patents, to have the sole Liberty of setting up a Play-house, be not only a Licence and Authority, which is confirmed by the King's Death, and so does not bind his Successor? And the new Players are licensed by his present Majesty.

Chief Justice. It is a Case of Consequence, and therefore we will take Time to consider of it.

Erve, Justice. I think the most proper Way is to proceed by Indictment. Adjourn.

Davis versus Speed.

Skinner. **T**HIS is Debt on a Deed for an Annuity, and the Action is laid in the County-Palatine of Chester, to which the Defendant demurs.

Vide post.
335.
Carr. 11,
113.

1. Because this Court hath not Jurisdiction.

2. The Bill is for Debt, and the Declaration is for an Annuity, which is a material Variance, for they shall receive different Judgments. *Yelv. 108. Lucas and Fullwood.* The Plaintiff enters his Suit in Placito Debiti, and declares, that the Defendant reddat ei 10 l. de annuatim redditu quo ei debet & injuste detinet. On nil debet the Plaintiff had a Verdict, but it was adjudged, *Quer' nil capiat per Billam*: For by his Declaration he demands an Annuity, which is contrary to the Entry of his Plaint in Placito Debiti. The Declaration was, *Per quod subtraxit annualem redditum*, he shall in a Writ of Annuity have a several and distinct Judgment; for in a Writ of Annuity he shall have Judgment of the arrears hanging the Writ; but in Debt he shall only have a Judgment for the Sum demanded.

Bill in Debt and Declaration for Annuity.
Cro. Eliz. 3. acc. et. 200. 3 Cro. 268.
Difference between a Writ of Annuity and Debt.
Fitzgib. 85. Skin. Rep. 66. Ca. in Law and Equ. 219. 1 Vent. 19. 2 Roll. Rep. 49. Comb. 57.

Then no Action of Debt lies for an Annuity for Life.

Chief Justice. No; nor on an Annuity for Years.

Cheshire contra. But this is all Annuity; the Bill and Declaration are the same in Annuity.

Chief

Chief Justice. They are so.

Vide 2 H. 7.
16, 17.
Pleads to the
Jurisdiction.
County-Pala-
tine.

Then as to the Jurisdiction. I don't know what became of Jennings and Hawkins's Case, there was a Plea to the Jurisdiction, in which there was another Point moved: That when the Defendant pleads to the Jurisdiction, he must also plead that he lides in the County-Palatine, or that he has lided there, so that he may be summoned, though the Cause of Action be laid in the County-Palatine, and it is not well pleaded without it, because Process cannot issue against the Defendant in the County-Palatine.

So that though the Cause of Action here existed in the County-Palatine, yet since that is not pleadable to our Jurisdiction, that is not material.

Judgment in
a Writ of An-
nuity.

Then Annuity lies, tho' the Annuity continues, to recover the Annuity and Arrears; but for the future there must be a Scire Facias on the Judgment.

Judgment pro Quer.

Churchy *versus* Rolfe.

Vide 1 Salk.
402.
6 Mod. 85,
163.
1 Mod. 1.
2 Lill. 47,
434.
Comb. 76,
224.
Where in a
Warrant of
Attorney to
confess Judg-
ment, no At-
torney need
to be present.

Per Holt, C. J. IF the Defendant is arrested, and in Execu- tion, and one becomes bound for him to the Plaintiff, and the Defendant gives him Judgment for his County-Summary, it is good, though no Attorney were present: And it is not within the Common Rule of the Court, because it was not given to the Person himself (in which Case there must be an Attorney present) but to a third Person.

Lee *versus* Barnes.

Where a Man
may plead in
Abatement of
the Declara-
tion, or not.
Fitzgib. 256.

Ch. Just. YOU may plead in Abatement of a Declaration where it is by Original, for the Pleas there are different; but if the Action is by Bill, you cannot plead in Abatement of the Declaration, but only of the Bill, for they are the same Thing, and therefore the Entry in such Case is Petit judicium de Billâ.

Bowyer

Bowyer versus Cook.

Vide ante,
136, 137.

Chief Justice. **I**N an Action against an Executor, the old Law only of 32 Hen. II. was to plead, *Nunquid Execor, nunquid Adminisrator*; but this is a dangerous Way, and it is the better Way to plead (and this Case would be) *is not Executor*, but that the Bishop has granted Administration to him, and that makes him not to be Executor. In Yelv. 213. it is said, there should be a Traverse; but all the Proceedings and the Reason of the Thing is to the contrary. If the Defendant is sued as Administrator, and he pleads that there is a Will, and that he is made Executor, there ought to be a Traverse, alique hoc that the Testator dies Intestate: But where he is sued as Executor, and he pleads that he dies Intestate, there needs no Traverse.

Diversity where one is sued as Executor, and where as Administrator, Camb. 220, 221.

Shower. Then the Conclusion, *Quod respondere non debet ad Billam*, is good, because the Plaintiff names us Executor, and not Administrator; and either this or *quod cassatur Billam* is good. a Bull. 250. Debt by Executor, and a protest, &c. the Defendant pleads, That the Party which was dead, died Intestate, and that Letters of Administration were granted to him, alique hoc that the Plaintiff is Executor; per Cur. the Traverse is not good, and Day was given to put him to a Peremptory Plea.

2 Saund. 97, 100, 337. N. Lury. 144.

Ch. Jus. You should have begun the Plea, *petit judicium de Billam*; But if there had been a Traverse, the Plea had been enough; or if he had said, alique hoc that he made her Executor.

Doc. But my Exception is, that he ought to have traversed, that he had not administered as Executor before Administration granted, for we have Liberty to charge him as Executor de son Tort as a rightful One. Mod. Rep. 239. is expresse on the Point: Debt against the Defendant, as Executor of J. W. Defendant pleads, J. W. made a Will, but made not him Executor, &c. and concluded in Bar. This is a Plea in Abatement only.

Carth. 104.

At another Day this Case was again debated.

Vide ante 136. Pleas in Abatement. Fitzgib. 37. Skin. Rep. 86.

Shower. No Traverse is necessary here, for a wrongful Administrator shall not be intended, but it is to come on their Side in their Replication. We have shewn, that the Plaintiff has mislaid his Action by charging us as Executor, and also we have shewn

P p

him

him how to mend it, that we are not Executors, but Administrators, which are the only two Things requisite in Pleas of Abatement, and must be done. So if the Defendant pleads to the Jurisdiction of the Court, it will be bad, unless he shew some other Court, where the Plaintiff may sue him. Then the Respondere debet is one Form, and you are to give Judgment according to the Nature of the Case, and we have shewn it abatable, and therefore you will abate it. Ch. Justice says every Plea must have its proper Conclusion. You should have pleaded in Abatement, but Respondere non debet is proper to the Jurisdiction, which, 'tis true, is in Consequence in Abatement; but they are two distinct Things, and you must begin and conclude the Plea properly, and put it to the Judgment of the Court. When a Man pleads to the Jurisdiction of the Court, Respondere non debet is a good Plea, sometimes it is si Curia cognoscere velit, &c.

Every Plea to have its proper Conclusion.

Plea to the Jurisdiction.

Vide ante 132, 133. 1 Saund. 283.

Traverse. Ante 136.

skin. Rep. 274.

But as to the other Exception, there ought not to be a Traverse, and the Plea is much better without it: for he allows that he is chargeable as to the Right, but that it is in another Manner than you have charged him, and shews that it is an Administration, which is enough, and is a full Answer to the Declaration. And it is a Foreign Intendment that he administered wrongfully, why should he traverse absque hoc that he administered as Executor de son Tort? That is a special Matter not charged against him; he need not traverse Administration as Executor before, when you only charge him generally in the Declaration, but you ought to reply, and shew what Act of Administration he had done: At Common Law an Administrator was only liable as Executor; we cannot suppose a Tort, unless it is alleged. But I think the Defendant ought to answer over for the other Fault. Respondere ouster.

D E

Term. Sancti Hill.

Anno 7 Will. 3. B. R. 1695.

Sir William Wentworth *ver.* Com^r Strafford.

THE late Earl of Strafford, in the Year 1676, gave a Warrant of Attorney to confess a Judgment at the Suit of the Plaintiff, and this was given to one Symphon, an Attorney in the County, and sent to one Wall, who was his : Entering Clerk, and the Judgment was entered accordingly, quod recuperet Debitum & Damna sua, and a Blank left to insert what the Sum should be for the Damages.

Wall died soon afterwards, and the Warrant of Attorney and his Papers were all lost; but Symphon, who was still living, made Affidavit of the fact.

And now a Motion was made for Leave to put in a Sum certain for the Damages and Costs, which was opposed for these Reasons:

1. Because there was nothing appeared to direct what the Amendment should be, as a Declaration, which may be amended by a Writ, or one Roll by another, &c.

2. If any such Thing had appeared in this Case, yet this could not be amended, because it was of another Term, this Judgment being now nineteen Years old; and though this should be admitted to be the Act of the Court, and so amendable, if in the same Term wherein the Judgment was entered, yet being now so many Years past, it cannot be done.

3. Neither can it be amended if it should be taken to be the Misprision of the Clerk; for at Common Law such a Misprision in Process was not amendable in another Term; and it is not

Vide 1 Salk.
52.
Ray 39, 398.
1 Sid. 70.
2 Mod. 316.
3 Mod. 112.
5 Mod. 148.
6 Mod. 263.
1 Lev. 22.

2 Samsd. 289.
290.

3 Lev. 430.
6 Mod. 164.
269.
1 Samsd. 249.
Skin. Rep.
591.

8 H. 6. c. 12.
Comb. 433.
Skin Rep.
253, 254.
Ca. in Law
and Equ. 88.

not warranted by the Statute 8 H. 6. which extends to Records as well as to Process, and likewise to Pleas, Warrants of Attorney, Original and Judicial Writs, Panels and Returns, in all which the Negligence of the Clerk is to be examined, reformed and amended in Accordance of the Judgment.

Those who argued for the Amendment, insisted, That the Court might put in any Sum to make the Judgment perfect, though it was uncertain what Sum they should allow for Costs, because it both not appear what was contested since the Warrant of Attorney was lost, and this may be done, especially since it appears to be the Neglect of the Clerk to enter the Judgment before the Costs were taxed.

Comb. 71.
Cr. in Law
and Equ. 38.
325.
Comb. 520.

The Writs omitted are the Writ of the Court, who have Power at Common Law to amend their own Judgments before any Statute of Amendment was made, though in another Term, as for Instance, in 4 Ed. 3. 92 B. 12. *Præcipe quod reddat* was brought, and the Defendants were adjourned to Tres. Mich. which was adjourned to *Crucifixo Purificationis*, when it should have been to *Octab. Pas.* but it was amended: And the Citation of the Clerk in that Case was more than in this.

2 Mod. 316,
317.
Yelv. 130.
Myl. 35, 39.
398.
2 Mod. 112.
2 Lev. 22.
2 Saund. 289.
1 Sid. 70.
Comb. 86,
265.

So where a Writ of Error was brought in B. R. upon a Judgment in Replevin for the Defendants, and an Error assigned in the Entry of the Judgment, in which these Words were inserted, (*viz.*) That the Plaintiff *nil capiat per Breve suum*, sed sit in *Misericordia pro falso Clamore*, and that the Defendants *cant inde sine Die*, but it was amended, and all these Words were inserted in another Term.

So where a Judgment general was given against an Executor, and it was not entered *de Bonis Testatoris in Manibus* of the Defendant administered, and yet that was amended in my Lord Hale's Time, and even in the very last Term in the Common Pleas several Continuances were omitted, and upon great Debate it was amended.

Comb. 393.

Curia. This is amendable, if the Court had any Thing to amend it by. It is the Act of the Court, and yet Judgment is not given by them as to the Damages. It might have been amended in the same Term, for though it is entered on the Roll, yet the Court hath Power to amend any Fault in a Record during that Term wherein it was entered.

Curia. This is amendable, if the Court had any Thing to amend it by. It is the Act of the Court, and yet Judgment is not given by them as to the Damages. It might have been amended in the same Term, for though it is entered on the Roll, yet the Court hath Power to amend any Fault in a Record during that Term wherein it was entered.

Rex *versus* Clough, & al.

THE Defendants were indicted at the Sessions upon the Statute 1 & 2 Ph. & Mar. by which it is enacted, That no Person dwelling in the Country out of a Corporation or Market Town, shall sell, or cause to be sold by Retail any Woollen Cloth, Linnen Cloth, Haberdashery Wares, or Mercury Wares, in any Corporation or Market Town, or the Liberties thereof, except in open Fairs, under the Penalty of 6s. 8d. for every Offence, and the Forfeiture of the Wares sold, or offered to be sold; one Moiety to the Queen, the other to the Seizer or Prosecutor, &c.

Stat. 1 & 2 Ph.
& Mar. c. 7.

The Indictment set forth, that the Defendants had sold Eastern Cloth in London, contra Formam Statuti, but it was quashed upon a Motion, because the Statute does not give Justices of Peace any Jurisdiction to proceed in this Matter at their Sessions, for they are not so much as named in the Act.

See 1 Salk.
406, 475.
68a.
Fingh. 83,
84.

Rex *versus* Inhabitants of Wootton-River.

S. C. 2 Salk.
492, 493.

TWO Justices of Peace made an Order for the Removal of a poor Woman from one Parish to another. The Order recited, That upon Complaint made to them, but did not say, by the Churchwardens or Overseers of the Poor, &c.

Comber 394.
Cartlew 222,
365.

This Exception being taken to the Order, it was insisted at the Bar, that if it is a Fault, yet it was helped by the Return of the Order; for there the Justices certify, that it was upon Complaint made to them by the Churchwardens, &c. so that if it is defective by this Omission, it is helped by the Return.

And as to the Order itself, it is not necessary to set forth, that the Complaint was made by the Churchwardens, &c. but where it is expressly alleged in the Order, that the Person to be removed did endeavour to settle himself in a Tenement under the yearly Rent of 10l. which was not mentioned in this Order, but only that he was likely to be chargeable, &c. and if so, then any of the Parishioners may complain.

Cases in Law
and Equity,
26.

To which it was answered and resolved by the Court, That the Complaint must be made by the publick Officers of the Parish, to whom the Care of the Poor is entrusted by Law, and without such Complaint the Justices of Peace have no Power to remove the Person; for the rest of the Parish may be willing to keep him, or may take Security of another Parish to indemnify

soluer. per Societatem Guild. five
Fraternitatem. unde huiusmodi ho-
mines liberi existunt & quilibet
liber existit respectivo in libera-
tur. [Anglice the Liberty] ejus-
dem Societatis Guild. five Frater-
nitatis. unde ipsi respectivo se ut
praefertur liberi homines existit.
qui quidem huiusmodi & quilibet
eorum respectivo se electi existit.
identem & non habentem sui ha-
bens aliquam retributibilem ran-
sam five excusationem. in contrarium
inde officium five locum unum
liberum. [Anglice of a Liberty-
man] ejusdem Societatis Guild.
five Fraternitatis respectivo in qua
quilibet huiusmodi liber homo
electi. fuer. omnes de liberatur in-
de a toto tempore supradicti. in
se susceperunt & suscipere totali-
ter fuerunt ac debuerunt & de-
bent ac officium ill. ac omnia
officii five loci illius onera & ex-
pensa & denariorum summas er-
ga supportationem & in & pro
bono publico & pro meliori regi-
mine ejusdem Societatis. a toto tem-
pore supradicto solverunt & sol-
vere soluti fuerunt & debuerunt;
& ulterius certifico quod infra
civitatem praed. habetur & a toto
tempore supradicto cujus contra-
rium memoria hominum non ex-
istit habebatur quaedam Curia
Dom. Regis. nunc & Praedecesso-
rum suorum Regum & Reginarum
Angliae de record. tent. septima-
na quolibet die Martis & quoli-
bet die Jovis coram Majore & Al-
dermannis Civitatis praed. pro tem-
pore existit. in Guildhall ejus-
dem Civitatis sciunt. in Parochia
Sancti Michaelis Bassishaw in

Wardis de Bassishaw in qua quid-
am dicitur de Aldermannis Civitatis
praed. pro tempore existit. &
omnes huiusmodi supradicti habue-
runt regulam & ordinaverunt
& tractant regulam & ordinave-
ri fuerunt & consueverunt un-
um ad praed. legem Societatis
Guild. five Fraternitatis Civitatis
praed. pro tempore existit. in
gen. de. infra. vel quomodocumque
concordem. qui coram eis dicit.
fuerunt pro meliori regimine &
gubernatione inde in supporta-
tione honoris & dignitatis ejusdem
Civitatis quodque liberi homines
existit. Cives Civitatis London
praed. quilibet societate Guild.
five Fraternitate Civitatis London
praed. & eor. quilibet toto tem-
pore supradicto fuerunt & fore
consueverunt & adhuc existunt
sub regimine gubernatione cor-
rectione & punitione praed. Ma-
jor. & Aldermannorum Civitatis praed.
pro tempore existit. in Curia
praed. in forma tent. pro omnibus
& singulis materiis per aliquem
huiusmodi liberum hominem So-
cietatis praed. inde facti. five fieri
omiss. contra five in prejudicium
boni regiminis & gubernationis
praed. Societatis Guild. five Fra-
ternitatis Civitatis praed. & ulterius
certifico quod infra Civitatem praed.
habetur & a toto tempore supra-
dicto habebatur quaedam al. con-
suetudo infra Civitatem praed. a toto
tempore supradicto. usitat. & ap-
probat. quod si aliqua querimo-
nia [Anglice Complaint] facti.
sunt in scriptis vel ore tenus praed.
Major. & Aldermannis Civitatis
praed. pro tempore existit. in

Curia

Curia p[re]s[ent]at. si ut p[re]s[ent]at. no-
minat de secundum consuetudinem
p[re]s[ent]at. tent. per Magistrum &
alios alicujus Societatis civitat.
p[re]s[ent]at. infra eandem civitatem sive
per magistrum principalem alicujus
Societatis civitatis p[re]s[ent]at. infra eun-
dem Civitatem in qua manifestum
esset sive custod. sive coram
aliqua auctoritate. quod aliqua
persona existens civis civitat.
p[re]s[ent]at. ac membrum ejusdem So-
cietatis electus & aliam per
officia illa fuit per Societatem. il li-
beratur. ejusdem Societatis unde
ipse membrum existit. ac requirit.
fuit ad officium sive locum unius
de liberatur. ejusdem Societatis
suspensionem. ac ad omni officii sive
loci illius subire. & sustinere.
quodque hujusmodi Civis liber
homo ac membrum hujusmodi
Societatis absque rationabili causa
sive exactione in contrar. inde
fuit de liberatur. hujusmodi Socie-
tatis officium sive locum il. sus-
cipere ac onus officii sive loci il-
lius subire & sustinere recusavit
ac inde potens remedium auxilium
& iustitiam ejusdem curie co-
ram Majore & Ald. ejusdem civi-
tatis pro tempore existens. sic ut
p[re]s[ent]at. secundum consuetudi-
nem p[re]s[ent]at. tent. in p[re]missis ver-
sus talem personam sic recusantem
ac superinde talis persona
virescit quam hujusmodi querimo-
nia fuit fuit existens. Civis liber
homo ac membrum hujusmodi
Societatis coram p[re]s[ent]at. Majore
& Ald. civitat. p[re]s[ent]at. pro tem-
pore existens. in Curia p[re]s[ent]at. con-
venit existens. coram eisdem Ma-
jore & Ald. in eadem Curia p[re]s[ent]at.
assessors

nulla cognoverit vel non dedero-
rit sed monitus per eandem Cu-
riam ad seipsum conformari. in
ea parte ad officium sive locum
il. super se suscipere ac onus offi-
cii sive loci illius subire & susti-
nere apertis voluntarie obstitit
& contumaciter absque aliqua
causa sive exactione quocumque
in contrarium inde fieri de libera-
tur. ejusdem Societatis unde ipse
sic ut p[re]s[ent]at. membrum exi-
stens. vel onus officii sive loci illi-
us subire & sustinere in eadem
Curia recusaverit tunc iidem Ma-
jor & Ald. civitat. London pro
tempore existens. in eadem Curia
tent. secundum consuetud. per
totum tempus p[re]s[ent]at. usitat. &
approbat. hujusmodi personam
sic recusantem in H[er]isona sub
custodia Vic. civitat. London
pro tempore existens. sicut ill. offi-
ciat. ibidem mandaver. & com-
miserunt ibidem sub custodia re-
mansur. & fore detent. quousque
eandem persona que sic in prisona
commissa fuit Concederet & de-
claret quod ipse officium sive
locum p[re]s[ent]at. inde susciperet ac
onus officii sive loci subiret &
sustineret vel aliter hujusmodi
persona extra prisonam & custo-
diam p[re]s[ent]at. vicecomitis vel alii
officiar. civitat. p[re]s[ent]at. per debitum
legis cursum deliberaretur & exo-
neraret. que quidem separat. con-
suetudines supra mentionat. nec-
non omnia alia consuetudines
& libera usagis [Anglice Frank
Allogis] civitat. p[re]s[ent]at. infra p[re]s[ent]at.
civitatis. usitat. Auctoritate Parlia-
menti Dom. Ric'i. nuper Regis
Anglie post conquestum secundi

tent. apud Westm. in Com. Mid.
 Anno regni sui Septimo tunc ma-
 jori & communicat civitat. præd.
 ratificat & confirmat. fuerunt &
 ulterius certifico quod ante ad-
 ventum dicti brevis de Habeas
 Corpus mihi in hac parte direct.
 scilicet quarto die Junii. Anno regni
 Dom. Regis nunc septimo. Isaac
 Clerke in brevi hanc schedula
 annex. nominat. qui adunc &
 diu antea & continue postea huc-
 usque fuit & adhuc existit. Civis
 civitat. præd. ac liber homo &
 membrum præd. Societatis vintar-
 rum in civitat. London. prædict.
 per Societatem illam debito modo
 electus fuit in liberatura ejusdem
 Societatis adunc & adhuc exis-
 tens idoneus homo pro officio
 illo ac ad officium sive locum uni-
 us liberator. [Anglice of a Li-
 bery Man] ejusdem Societatis in
 se suscipien. ac ad onus officii sive
 loci illius subeund. & sustinen.
 secundum consuetudinem civita-
 tis præd. a toto tempore supra-
 dicto usque. & approbat. in ea-
 dem unde idem Isaac Clerke ad-
 unc notitiam habuit & ad officii-
 um illud super se suscipien. re-
 quisit. fuit quod facere præd. Isaac
 Clerke adhuc penitus recusavit
 super quo postea & ante ad-
 ventum præd. Brevis de Habeas
 Corpus mihi in hac parte direct.
 scilicet die Martis tertio die Decem-
 bris. Anno regni dicti Dom. Re-
 gis nunc septimo. quædam que-
 rimonia [Anglice a Complaint]
 facta fuit ore tenus Johanni Hou-
 blon mil. adunc & adhuc Majori
 & tunc Ald. Civitat. præd. in
 Curia præd. tunc tunc coram præ-

fat. Majore & Ald. Civitat. præd.
 per quendam Thome Collett
 adunc magistrum & quendam Hen-
 dovicum Willm. Thome Peil-
 der & Johannem Knapp. adunc
 missos. Societatis Vintarum in
 Civitate London. præd. ostendit
 quod præd. Isaac Clerke existit
 Civis & liber homo Civitat.
 præd. ac membrum societat. Vin-
 tarum præd. in Civitate London.
 præd. & idoneus homo pro officio
 præd. existens. electus fuit per So-
 cietatem illam in liberatura ejus-
 dem Societatis & adunc & diu
 antea idoneus homo existens tam
 ad officium quam ad onus ejus-
 dem officii subeun. requisitus
 fuit ad officium sive locum unius
 de liberatura ejusdem Societatis
 in se suscipien. ac ad onus officii
 sive loci illius subeun. & sustinen.
 Idem tamen Isaac Clerke Civis &
 liber homo Civitat. præd. ac
 membrum ejusdem Societatis abs-
 que aliqua rationabili causa sive
 excusatione in contrarium inde
 fore de liberatura ejusdem Socie-
 tatis & officium sive locum illum
 in se suscipere ac onus officii sive
 loci illius subire seu sustinere pe-
 nitus recusavit ac proinde magi-
 stri & custodes per querimoniam
 illam remedium auxilium & justi-
 tiam Curie præd. coram Majore
 & Ald. præd. secundum consue-
 tudinem præd. tent. in præmissis
 præd. versus præfat. Isaac Clerke
 petierunt ac superinde præd. Isaac
 Clerke coram præfato Majore &
 Ald. Civit. præd. in Curia præd.
 adunc & ibid. secundum consue-
 tudinem præd. coram Majore &
 Ald. Civitat. præd. tent. convent.
 existen.

existen. & personaliter comparen. coram illis Major & Ald. Civitat. præd. in eadem Curia præmissa præd. non deduxit videlicet quod ipse existen. civis & liber homo Civitatis præd. ac membrum ac liber homo Societatis præd. ult. mentionat. existen. ac etiam idoneus homo tam ad officium præd. quam ad onus officii illius subeun. electus fuit per Societatem illam in liberatura ejusdem Societatis & requisit. fuit ad officium sive locum unius de liberatura ejusdem Societatis suscipien. ac onus officii sive loci illius subeun. & sustinen. ac præd. Major & Aldermanni præd. electionem præfat. Isaac Clerke ut præfatur fact. approbaverunt & allocaverunt. Idem tamen Isaac Clerke Civis & liber homo Civitatis præd. ac liber homo & membrum Societatis illius & idoneus homo & præfatur. existen. officium sive locum illud in se suscipere ac onus officii sive loci illius subire & sustinere recusavit coram præfat. Major & Aldermannis Civitatis præd. in aperta Curia prædict. coram prædict. Major & Ald. die & loco ultimo supradicto tent. super quo præd. Isaac Clerke adtunc & ibidem in eadem Curia per præfat. Majorem & Aldermannos Civitatis præd. ad se ipsum conforman. in ea parte ac ad officium sive locum illum in se suscipien. ac ad onus officii sive loci illius subeun. & sustinen. sapius in eadem Curia ibidem monitus fuit præd. tamen Isaac Clerke non habens nec allegans aliquam causam sive

excusation. quamcumque in contrarium inde post huiusmodi monitionem sibi in forma præd. fact. fore de liberatura ejusdem Societatis ac officium sive locum illum in se suscipere ac onus officii sive loci illius subire seu sustinere in eadem Curia ibidem adtunc aperte voluntarie obstinate & contemptuose absque aliqua causa sive excusatione quamcumque in contrarium inde officium illud suscipere super se & onus inde subire adtunc & ibidem remittit & expresse recusavit per quod præfat. Major & Aldermanni Civitatis London præd. adtunc & ibidem in eadem Curia ante adventum præd. Brevis de Habeas Corpus præfat. Isaacum Clerke sic recusantem per quoddam Warrantum in scriptis secundum cons. præd. in prisona sub custodia mea mandaver. & commiser. ibidem remanfur. & fore detent. quousque idem Isaac Clerke Contestret & declararet quod ipse officium sive locum præd. in se suscipere ac onus officii sive loci illius subiret & sustineret vel aliter per deb'um legis cursum deliberat. & exonerat. foret & ulterius certifico quod præd. Isaac Clerke ad aliquod tempus hucusque non consentivit seu declaravit quod ipse idem Isaac Clerke officium sive locum præd. in se suscipere. seu onus officii sive loci illius subire & sustinere voluit nec officium & locum il. in se suscepit nec onus officii sive loci illius subivit seu sustinuit & hæc est causa captionis & detentionis præd. Isaac Clerke in prisona

longa nica quam una cum corpore
prefat. Regis Clerice coram pnd.
Johanne Holt mil. capital. iudi-
cior. pnd. dñi Dom. Regis nunc
ad placita coram ipso Rege te-

non afflig. ad tempus & letum
in Bevi huius Scholae amara
detent. parat. habeo nam cum
dico Bevi prout mihi per idem
Breve precipitur.

B. C. 20/2. 315.

Company of Vintners *per* vs Clerke.

Vide 1 Mod.
10, 164.
Ray. 447.
1 Salk. 341,
352.

6 Mod. 123.
177.
4 Mod. 27,
28.
Ants 104.
Pest. 320,
438, 439.

Comber. 411,
412.

UPON an Habeas Corpus directed to the Warden of Newgate
be returned.

That the City of London has an ancient City, and that the Citizens and Freemen thereof have Time out of Time been incorporated by the Name of Mayor, Commonalty, and Citizens, &c. That there are several Companies, Guilds and Franchises amongst the said Citizens, of whom the Company of Minners had One; which Company was incorporated by the Name of Master, Wardens, Freemen, and Commonalty of the Mystery of Minners: And that some Freemen of that Company were always of the Liberty, and chosen by that Company, who being so chosen and so Persons for the said Office, was actually both the same without some reasonable Excuse to the contrary.

That there was a Court of Record held in the said City be-
fore the Lord Mayor and Aldermen at Guildhall twice in every
Week, where Rials and Orders were made in all Things rela-
ting to the said Companies for the better Government of the
City, and that the said Companies were under the Correction of
that Court.

That there is a Custom in the said City, If any Complainer should be made to the Mayor and Aldermen of the said Court, by the Mayor and Wardens of any Company, of a Libertyman chosen, and refusing to take the Office, being appointed by that Court to accept it, That then the Mayor and Aldermen have used to commit the Person so refusing to the Custody of the Sheriff of London, or any other Officer, there to be detained until he should consent, and declare that he would take upon him the said Office.

Then he sets forth, That these Customs were confirmed by Act of Parliament; and that before the issuing forth of the said Writ, one Isaac Clerke, being a Citizen of London, and a Freeman of the Company of Miners, was chosen of the Liberty, and required to take upon him the said Writ, which he refused: Whereupon Complaint being made to the Mayor, &c. by the Master and Wardens of that Company, the said Clerke was summoned to appear, &c. which he did, and refused to take upon him the said

That the said Defendant by the Court to commit, did still remain, till the Mayor, &c. by a Warrant in Writing, did command him to appear, there to remain until he should consent and declare, whether he would accept the said Office; and that this was the Cause of his Taking and Imprisonment.

Those who argued against this Return, said, That it consisted of several Parts, of which this Court could not take any Notice; but that none of these Parts were contained in the Warrant of Commitment, and that no Matter ought to be put in the Return which the Warrant itself does not lead unto.

1. That the Return is void, both in Substance and Form; and it is void in Form for these Reasons:

Because the said Declaration, That the Mayor and Aldermen have a Custom to commit, till the Offender should consent and declare his willingness to take upon him the Office; but he did not set forth to whom he should signify such Consent; it being therefore uncertain to whom such a Declaration should be made, it is void for that Reason, especially in this Case where the Liberty of the Subject is concerned, which is so much laboured by the Law.

Besides, 'tis a bold and impertinent Custom to commit a Man to Prison, until he should consent and declare to hold an Office; the Mayor and Aldermen may have a Power to summon Men before them by Virtue of some ancient Custom, in order to reform or punish Offenders: But the Commitment in this Case is not a Punishment for the Refusal to take the Office, but because the Defendant would not declare he would do it; and when such a Declaration is made, then he is at large again, and may break his Word by refusing to be of the Livery, &c.

They might have imposed a Penalty to be levied by Distress, but ought not to commit the Offender; and thus it was adjudged in Clerke's Case, (viz.) The Town of St. Albans was incorporated by Ed. 6. and had Power to make By-Laws, and the Term being held there, the Mayor, by the Consent of Clerke, who was one of the Burgesses of the Town, &c. made an Order for assessing every Inhabitant to the Charge of erecting Courts for the Judges and Justices, and those who refused to pay, to be imprisoned; Clerke refused, but it was adjudged, that the Mayor could not justify his Commitment by Virtue of that Order; because he ought to have inflicted a Pecuniary Punishment, or he might have brought an Action of Debt upon the By-Law, made for the forfeiture of a particular Sum.

1 Jo. 162.
8 Co. 127.
Mo. 411, 412,
580.
5 Rep. 64. 2.

Winch's
Ent. 252.

March 179.

A Custody for the Cause of Aldermen to commit until the next Session should take the Oath of Alderman, was held good, because it is a publick Office for the Administration of Justice, and for the Government of the City, which are things of Necessity; but it does not appear, that the Office of a Liberman is of any publick Concernment.

Style 78, 84.

There are but few Authorities in the Books relating to this Objection; some there are; as for Instance: In an Action of false Imprisonment, the Defendant justified under a Custom in London, to commit a Man for disturbing the Election of a Warden of a Company, and to continue him in Custody until he would promise not to disturb such Elections; And upon a Demurrer to this Plea, the Plaintiff had Judgment.

1 Mod. 10.

So upon the Return of an Habeas Corpus, the Cause of Imprisonment did appear to be, for that he being chosen of the Liberty, refused to serve, and it was not until he should make an Indignant Declaration of his Consent to hold the Office, and yet in that Case the Imprisonment was adjudged to be illegal; for they might have fined the Offender, and have brought an Action of Debt for the Fine, but they could not commit for such a Refusal.

2. Exception, II. The Gaoler hath not set forth his Warrant in *hæc verba*, but only that per quoddam Warrantum in scriptis secundum consuetudinem, &c. the Defendant was committed, and this is introduced with a long Story, not pertinent to the Commitment itself, of which he hath not set forth any Cause.

31 Car. 2.
cap. 2.

Now by the Statute 31 Car. 2. commonly called the Habeas Corpus Act, the Judges of either Court in Westminster may, upon Application made to them by the Prisoner, and upon View of the Copy of the Warrant of Commitment, or upon Oath made that it was denied, grant a Habeas Corpus in Matrimonium, returnable immediate; which Statute would be eluded if the Warrant itself should not be returned, for if the Officer should return any Cause different from the Warrant of Commitment, and such for which a Habeas Corpus is not allowed by that Act, then the Person must still be kept in Custody, tho' he is really bailable by Law, and he hath no Remedy but to bring an Action against the Gaoler for a false Return.

Therefore it seems necessary, that he should return the whole Tenor of the Warrant, that the Court may make a proper Judgment of it: for otherwise by a Return of the Commitment generally, the Gaoler makes himself a Judge of the Cause.

Neither

Neither doth it lie in the Power of the Officer to amend the Warrant of Commitment, but he is to return it as it is, that the Court may judge of it; 'tis his own Error for keeping the Prisoner in Custody, and if the Return and Warrant do not agree, he may keep him in Custody longer than the Law allows.

The whole Warrant was returned in *Bathell's Case*, and this is agreeable to Law in other Proceedings; for if a Man is bound to make a sufficient Release to another, 'tis not enough for him to say generally, that he executed a Release, but he must set it forth at large, that the Court may judge whether it is sufficient or not.

The Habeas Corpus Act takes Care, that a Person who is bailed shall not be recommitted for the same Offence, under the Penalty of 500*l.* to the Party grieved, any colourable Pretext or Variation in the Warrant of Commitment notwithstanding. From which it may reasonably be inferred, That the Makers of that Law did intend the Warrant should be returned; otherwise if the Party should be recommitted, how can it appear to be for the same Cause for which he was in Custody before?

Now it doth not appear upon this Return, but that the Warrant may be illegal, and the Commitment not to be justified by Law: Therefore it ought to be set forth at large, that the Court may judge of the Legality of it.

It is always so in the Common Cases of Orders made by Justices of Peace; for it may not appear in the Order itself, that those who signed it were Justices of Peace at that Time; and though it should appear so upon the Return of the Certiorari to remove such Order, yet this Court would quash it.

3. Exception. And the most insisted on, was, That in the Return a Custom was laid for the Mayor, &c. to commit the Offender to the Custody of the Sheriffs of London, or other Officer; and the Gaoler had returned, That he was committed Custodia mea, when it doth not appear that he was either Sheriff or Officer at that Time; so that more is put in the Judgment than that is warranted by the Custom.

'Tis likewise said, That he was committed to Prison, but doth not say where; if he had returned, that the Prisoner was committed to Newgate, it might have been better, yet that would have been insufficient; for tho' Newgate is the King's Gaol, and admitting that the Person to whom the Defendant was committed was then Keeper thereof, yet that doth not make him appear to be an Officer of the City at that Time.

4. Lastly,

4. Lastly, 'tis said, he was committed quousque concetiret, which is void and insensible, there being no such Word.

Econtra.

These Exceptions were thus answered by the Counsel, who maintained the Return to be good.

1. As to the first it was answered, That if the Party declares his Consent to any Person that he would accept the Office, 'tis sufficient; for upon such a Declaration of his Mind he may be brought before the Court, and discharged from his Imprisonment.

And as to the Illegality of the Custom itself, to commit for refusing to take upon him the Office of a Liveryman, it was argued, That the Customs of London are confirmed by Act of Parliament, to which all People virtually give their Consent; therefore a Commitment by Virtue of a Custom thus confirmed, in order to enforce an Obedience to it, is justifiable by the Law of the Land.

The City of London have many Customs more unreasonable than this is, and which likewise tend to restrain Men of their Liberty, and yet they are allowed, because they co-operate with an Act of Parliament; as for Instance, There is a Custom for a Creditor to arrest a Debtor before the Day of Payment, in order to compel him to give better Security for the Debt.

There is another Custom for a Constable, upon Suspicion only of any Immorality, to break open an House, and to commit the Offenders, which is expressly contrary to Law; and yet such Customs being the particular Usages of the City, are become Leges loci, and being confirmed by Act of Parliament, are binding to the Inhabitants.

Then a Commitment quousque may be good according as the Fact is, unless 'tis in Execution; and so was the Commitment in Alderman Langham's Case, until he should take the Oath of Alderman, &c.

Besides, the Court of Aldermen is a Court of Record, the Judges send Prohibitions to them. Now it appears upon the Return, that the Defendant Voluntarie, obstinate & contemptuouse, refused to take upon him the Liberty of his Company, and 'tis incident to a Court of Record to commit for a Contempt.

* March.

8 Rep. 119. b.
March 166.

2. As to the second Objection, That the Warrant is not returned in hac verba; it was said, that it is not necessary, for tho' the Law labours Liberty, yet it labours likewise Magistracy and Proceedings in Courts of Justice.

If the Commitment had been by Writ Process, then it might be necessary to set out the Warrant at large; but when it is in a judicial Way by a Court of Justice, it is not usual to do it: As if a Commitment is made by B. R. and a Habeas Corpus is directed to the Marshal, he never returns the Warrant itself.

Therefore this is not within the Habeas Corpus Act, for it is a Commitment in Execution by a Court of Record for a Contempt of their Authority, and in such Case the Warrant itself is never returned; it is sufficient to say, That the Person was committed per Mandatum Domini Cancellarii vel Dominorum in Concilio; and it is likewise sufficient, as in this Case, to set forth, that it was per Warrantum in Scriptis secundum consuetudinem Civitatis, &c.

At Common Law it was sufficient to set forth the Substance, and not the Thing itself, which must be understood where the Officer did not take upon him to disclose the whole Fact; but here he hath returned the whole Matter, which if not true, it is at the Peril of him who made the Return, and the Party grieved may have a Remedy by Action.

* Quare, For it concludes thus, (viz.) Till he shall be discharged by due Course of Law; which is not a Commitment in Execution. Raym. 446. Brownl. Redi. 385.

3. As to the third Exception, That it is not returned, that the Keeper of Newgate was an Officer of the City; it was answered, that the Return begins thus, (viz.) Ego Jacobus Fell, Custos Carceris Domini Regis de Newgate, &c. and when he comes to the Warrant, he sets forth, that the Defendant was committed to Prison in Custodia mea; which can be intended of no other Person than he who was at that Time Keeper of Newgate, who is well known to be an Officer of the Sheriffs of London, for the Judges deliver that Gaol every Month.

Co. Ent. 346.

4. Then as to the last Objection, If the Word Consentiret is insensible, it is therefore void; but the following Word Declararet hath a certain Signification, and is more comprehensive than Consentiret if it had been Right, because a Man may consent to a Thing, and never declare his Consent openly; but when he makes a Declaration thereof, he doth both,

T :

Curia,

Guria. A Commitment, till he should declare his Consent to accept the Office, is more than it he had been committed till he should actually consent; therefore, tho' the Court of Aldermen might commit him until he should consent, yet they may have no Power to imprison him till he should declare it.

As to the Warrant, it is always set forth at large in a Return made upon an extrajudicial Commitment; but when a Man is committed by a Court of Record, there is no Warrant at all; therefore the Court of Aldermen in this Case cannot be intended to proceed judicially, because the Commitment is per Warrantum in Scriptis. They are the proper Judges of an Excuse made by the Defendant, who he will not take upon him the Liberty; and if they adjudge it insufficient, and appoint him to accept it, and he refuseth, it is a Contempt of their Authority, for which they may commit him.

But he is committed to the Keeper of Newgate, who may be an Officer of the City, but not one attending the Court of Aldermen; so that it doth not appear that he is a proper Officer of that Court to receive him, and therefore not like a Commitment by B. R. to the Marshal, who is a proper Officer always attending that Court; and so is the Sheriff, where the Commitment is made by a Judge of Oyer and Terminer: Neither doth it appear that Newgate is in London; but if it did, he ought to be committed to the Sheriffs, and not to the Keeper of Newgate, tho' they might have taken him as their Officer; but this Court cannot take Notice that he is an Officer to the Sheriffs, no more than they can what Boroughs send Burgesses to Parliament. As for Instance; by the Statute 17 Car. 2. Those who preach in Conventicles shall not come, or be within five Miles of a Borough which sends Burgesses to Parliament. A Man was indicted upon this Statute for living in such a Borough; but it was quashed in this Court, because it was not averred, that the Borough wherein the Defendant lived did send Burgesses to Parliament.

Now certainly it is as well known to this Court, what Boroughs send Burgesses to Parliament, as that the Keeper of Newgate is an Officer of the Sheriffs of London; for which Reason the Return was held insufficient, and the Defendant was discharged.

Rex versus Hall.

AN Order was made by two Justices of Peace, to remove a poor Man from Redburne to the Parish of St. Michael in St. Albans; and upon an Appeal to the Quarter-Sessions, the Order of the two Justices was quashed.

Vide post,
209, 397,
416,
Comb. 374

Afterwards, upon a Certiorari brought, the Sessions Order was quashed, and the first Order was confirmed, so that the poor Man was now settled at St. Albans; but of his own Accord he returned to Redburne, and the Justices confessed that they had not any Power to send him to the House of Correction for returning as aforesaid, because they were of Opinion that the first Order was not before them, being removed by Certiorari.

2 Salk. 481.

Therefore a Motion was made, that the Court would grant a Rule to enforce the Execution of the former Rule made in this Case, by which the Sessions Order was quashed, and the Order of the two Justices confirmed.

14 Car. 2,
cap. 12,
One Justice,

Fitzgib. 254,
Ca. in Law
and Equ. 25,
26, 84.

But the Court directed, that the Justices should have the former Rule of Court shewed to them, and the Order of the two Justices, and if they refused to punish the Person afterwards, then to move the Court upon an Affidavit of the Matter.

Rex versus Paine.

INformation tried at the Bar by a Bristol Jury, against one Samuel Paine, a Minister there, setting forth, That the Defendant was the Composer, Author, and Publisher, of a most malicious and wicked Libel against the late Queen Mary, which was killed, Her Epitaph.

Vide 1 Sid.
270, 271.
2 Salk. 417,
418.

Upon Not guilty pleaded, the Case upon the Evidence appeared to be thus:

That Paine wrote the Libel, it being dictated to him by another. That he afterwards put it into his Study, and by mistake delivered it to one Brereton instead of another Paper, who transmitted a Copy thereof (through several Hands) to the Mayor of Bristol, which occasioned the Mayor to send for Brereton to examine him, which he did upon Oath, but not in the Presence of Paine.

Comb. 338,
359.

The Defendant Paine was afterwards examined by the Mayor, and confessed, that he wrote the Libel, but that he did neither

compose

compose or publish it, only deliver'd it, instead of another Paper, to Brereton: But it was proved by his Servant, that he sent him to his Study for a Writing, and that he not bringing the Paper sent for, the said Paine fetched it himself, and being in a Room only with Dr. Hoyle, the Libel was repeated, but he could not tell by whom; but he remembered the first Verse.

Brereton was now dead, and the Question was, Whether his Depositions taken before the Mayor should be given in Evidence at this Trial?

The Counsel for the Defendant insisted, that it could not be done by Law, because Brereton being dead, the Defendant had lost all Opportunity of cross-examining him; that this Case was not like an Information before a Coroner, or an Examination by Justices of Peace of Persons accused, and afterwards committed for Felony, because they have Power by a particular Statute to take such Examinations both of the Fact and Circumstances, and to put it in Writing, and certify it at the next general Gaol-delivery.

1 & 2 Ph. &
Ma. c. 13.
2 & 3 Ph. &
Ma. c. 10.
H. P. C. 263.

Hawk. P. C.
Part 2. c. 46.
§. 36. and
§. 6. to 64.

But Depositions of this Nature are never allowed to be read as Evidence in a civil Cause, and much less in a criminal Case; that before the making those Statutes, no single Justice had Power to take the Information of Witnesses against Criminals, neither could the Conservators at Common Law take such Depositions. They might remove or secure the Disturbers of the Peace, and the Justices of Peace now may prepare Business for the Sessions; but they have no Jurisdiction before the Indictment found: But if at any Time before the Statute they had taken such Examinations, they were never given in Evidence against the Party.

To which it was answered, That the Statute makes no Difference in this Case, for the Power of a Justice of Peace to take Examinations is not grounded upon it; for he might examine a Criminal by Virtue of his Office, and the Statute doth only enforce the Execution of his Office by commanding him to take such Examinations; so that if he had committed it to Writing, and transmitted it to the Gaol-Delivery, it would have been given in Evidence to convict the Party; and the Reason why such an Examination should be read, is not by Virtue of any Statute Law, but by the Authority of the Person before whom the Oath is taken; and if such Oath should be false, the Party might be convicted for Perjury.

The

The Court thereupon sent the Justice Judge to confer with the Justices of the Common Pleas, who returning, the Chief Justice declared, That it was the Opinion of both Courts that these Depositions should not be given in Evidence, the Defendant not being present when they were taken before the Mayor, and so had lost the Benefit of a cross Examination.

Then the Questions arising upon the Evidence to prove the Defendant guilty, were these:

1. Whether he was the Author and Composer of the Libel?

2. Whether he was guilty of the publishing it?

As to the first Point, there was no Proof that he was the Composer of it, or that he wrote it, but by his own Confession before the Mayor. Now if such Confession shall be taken as Evidence to convict him, it is but Justice and Reason, and so allowed in the Civil Law, that his whole Confession shall be Evidence as well for as against him, and then there will be no Proof of a malicious and seditious Publication of this Paper, for he confessed that it was delivered by Mistake.

Then as to his publishing it, if the Evidence had come up to prove that he read it, that will not be a Publication, and the Writing without the Publishing is no Crime.

It is true, my Lord Coke saith, Where 'tis maliciously repeated, or where a Copy of it is delivered to another, this will be a Publication; but here is no Proof that the Defendant repeated it in the Presence of Dr. Hoyle; for non constat, but that the Doctor might read it to the Parson.

The Jury, upon Consideration of the whole Matter, found a Special Verdict, (viz.) That a certain Person to them unknown did pronounce, dictate and repeat the Words contained in the Libel, which the Defendant did write, and if that will make him guilty of composing and making the Libel, then they find him guilty; and as to the Publication thereof, they find him not guilty.

This Verdict was afterwards argued, That there was sufficient Matter found to make the Defendant guilty; for 'tis essential that a Libel should be in Writing. Words may make a malicious Speech, but 'tis Writing which makes a Libel, and this agrees with my Lord Coke's Definition of a Libel, That it is Scriptura Defamatoria.

U u

This

Rep. 125.

Rep. 125.

This is the first thing that is demanded in Writing, and therefore it differs from Composing, for that must be of something in Being before: But in this Case, when the Defendant heard the Words repeated, he wrote they were defamatory, and he could have no other Purpose in writing it, but to perpetuate his Memory, and so to make it a Libel, which was not in before.

Pro Def.

It was argued for the Defendant, That there are three Things to be considered in this Matter, (viz) the Writing, the Making, and the Publication; the Defendant is acquitted of the last, so that if the Writing does not amount to the Making and Composing, then he must be acquitted of the whole.

Now it cannot be said, that Writing is either a Making, or Composing what is written; for if that should be true, then a Man cannot write any Thing, but he must be the Author of it.

Lamb's Case,
9 Rep. 60.

The Writing may be some Evidence to a Jury, that he did it with an Intention to publish it, but he is acquitted of that; so that to make the Defendant Guilty of this Information, he must be found to be a Conspirer, or a Procurer of contriving it, which can never be by writing a Copy.

And for the sake of transferring a Libel is criminal, in a Matter of another Consideration, it is certainly an Offence, and by consequence punishable to transcribe it, but it hath been a Question, whether the Writing and delivering it to the Party himself is punishable by an Action on the Case? And 'tis generally held, that such an Action doth not lie at Common Law, because 'tis no Publication to deliver a Libel to the Party defamed, which is essential to make a Man guilty of it; but because it is an Offence against the King, and tends to the Breach of the Peace, 'tis punishable in R. R. by Information at the Suit of the Attorney General.

Hob. 117.
Pop. 139.
Idem.
12 Rep. Dr.
Wooton's
Case.
3 Inst. 174.

Now the Reason given in the Books, why an Action will not lie if I send a Libel, is because the Party intended to be defamed received no Injury, for he cannot be defamed where there is no Publication of the Libel; and the Reason is the same in this Case, because there was no Publication; and it is the same Offence to write and not to publish, as to write and immediately to publish the Libel.

1 Vent. 31.
Cro. Car. 125.

And, It writing or transcribing a Libel is a Crime, yet as it is laid in this Information, and proved by the Jurors, the Court cannot give Judgment on it; for the Jury have found it generally, That it writing is Making and Composing, then they find him guilty, but do not say Modo & forma as laid in the Information; they should have found quo Animo he did write it.

I

Curia.

Curia. The making a Libel is an Offence, tho' never published, and if one writes, and another writes, both are guilty of making it.

To what Purpose should any one write, or copy after another, but to show his Approbation of the Contents of the Libel, and the better to enable him to hear it in his Hearing, that he may repeat it to others.

Now, though the bare reading a Libel may not be a Crime, because a Man may be Surprised, and not understand what he is about to read; yet when one takes it from another, and hears it spoken before he writes it, this cannot be by Surprise, because he had Time to exercise his Thoughts before he writes what he heard read; so that it is not a Libel by repeating, but by writing it.

It hath not appear upon the Evidence, that this Libel was ever written before, so that the Defendant must be guilty of the Writing it, by first reducing it in Writing, though probably he might not commit it.

It is true, the Publishing it by Writing is no Publication, and if there was no other Evidence against him but his own Confession, the Libels must be taken, and not so much of it as would serve to convict him.

But when he sent his Servant to his Study for a Paper, when he did not approve of the Paper brought by the Servant, but fetched another, 'tis not material whether it was read by Dr. Hoyle, or not, for if that was the Libel, and read by either, 'tis a Publication.

If one repeats, and another writes a Libel, and a third approves what is wrote, they are all Authors of it; for all Persons who concur, and give their Assent or Approbation to do an unlawful Act, are guilty; So that murdering a Man's Reputation by a scandalous Libel, may be compared to murdering his Person, for if several are assisting and encouraging a Man in the Act, tho' the Stroke was given by one, yet all are guilty of Homicide. Sed Adjournatur.

King versus Sharp & al.

SCRIP against the King: To which, the Defendants plead. In Bar, That the Principal died before the Day of the Return of the Capias ad satisfaciend' against him, which might be the Alias Capias, for he hath not say ante return' alicujus Brevis de Capias, &c. And upon a special Demurrer to this Plea, and this Matter

Vide 1 Salk. 417, 418, 419, 646.
1 Sid. 270, 271, 414.
1 Mod. 58.
Hard. 470.
Hawk. P. C. part 1. c. 73.
§. 10, 12, 13, 15.
Fitzgib. 47, 48, 57.
Mod. Ca. in Law and Equ. part 1. c. 238.
329, 330.
Cuth. 407, 408.

Hale's P. C. 1st. part 424.
Hawk. P. C. part 1. c. 26.
§. 2.

Vide 1 Salk. 8.
1 Mod. 5, 6.
1 Vent. 253.
6 Mod. 142.
Ca. in Law and Equ. 256, 257.
Mod. Ca. in Law and Equ. part 1. c. 31, 340.

Matter being shewn for Cause, for he may die before the Return of the Alias Capias ad satisfaciend^{um} whereas the Condition was broken by the Return of the first Capias, the Plaintiff had Judgment, although it was insisted, that this Plea being in Bar was good to a Common Intent; but the Court was of Opinion, that the Word Alicujus was necessary, which being omitted, the Plea was ill.

Haines versus Jescott.

Vide Vaugh.
206, &c.
302, &c.
2 Rev. 254,
255.
2 Vent. 9, 10.

Carth. 271.

32 H. 8. 38.
Skin. Rep. 37.

2 Inst. 683.
Comb. 207,
356.

Vaugh. 214,
215, 315,
316, &c.

Prohibition to the Ecclesiastical Court on a Suit there, against a Man for marrying his Sister's Bastard-Daughter: The Reasons offered were;

1. This Marriage is not prohibited by any Law, it is not within any of the Levitical Degrees, and such only are under the Cognizance of the Spiritual Court; for if a Marriage is not under some of these Prohibitions, 'tis not to be impeached by any Court, because it is enacted by the Parliament, That all Marriages contracted by lawful Persons shall not be dissolved; and such are all those who are not prohibited by God's Law.

Now this Marriage is not prohibited by God's Law, which must be intended the Levitical Law given to the Hebrews, under the Mosaic Dispensation; in which Law there are six Degrees of Consanguinity, and seven of Affinity, expressly forbidden.

In Consanguinity.

1. His Father's Sister.
2. His Mother.
3. His Mother's Sister.
4. His Sister.
5. His own Daughter.
6. The Daughter of his Son or Daughter.

A Man must not marry,

In Affinity.

1. His Uncle's Wife.
2. His Father's Wife.
3. His Father's Wife's Daughter.
4. His Brother's Wife.
5. His Wife's Sister.
6. His Son's Wife, or his Wife's Daughter.
7. The Daughter of his Wife's Son or Daughter.

A Man must not marry,

But

But a Sister's Bastard is not mentioned amongst any of these Degrees.

It is true, the Levitical Law doth forbid a Man to approach to any near of Kin to uncover their Nakedness; but that can never be intended of a Bastard, because he is of Kin to no Person whatsoever; he is not esteemed as a Child in our Law, neither is he of sufficient Consideration to raise an Issue as one of the Kindred of the Grantor; he is *quasi nullius Filius*: And therefore it is not a principal Challenge to him, being returned of a Jury that he is of Kin to either Party, because he cannot be of Kin to any; so in pleading either in a real or personal Action, he cannot alledge any Kindred, and nothing can be conferred upon him, but it must be such a Name which is common, and may be assumed by any other Person. 6 Rep. 65.

It is also true by the eighteenth Canon of the Apostles, a Man who married his Sister's Daughter, *Clericus non potest esse*, which is all the Punishment that the Church, in those Days, could inflict on the Person so married; they had no Jurisdiction, or Power of Divorce, even in Cases of incestuous Marriages, and therefore could not enter into any Examination of the Cause; but when the Parties were separated, it was by the Authority of the Laws to which they were locally Subject; and therefore it may be a Question, What Power the Spiritual Court hath to proceed in this Matter? But it being a Jurisdiction which hath often been allowed, it was not disputed now, only a Prohibition was prayed upon the whole Matter.

Econtra.

The Plaintiff cometh too late for a Prohibition, for he hath answered all the Allegations in the Ecclesiastical Court, where it appeared upon Proof, that the very Parson who baptized the Bastard married her to the Plaintiff, and did not aggravate the Offence to him before Marriage; but he persisted in his Resolution.

Now as to the Levitical Law, it expressly prohibits that *ad proximum Sanguinis sui non accedat*; and at the Time when this Law was established, there was no Difference amongst the Israelites between a Child born in Adultery, and lawful Marriage; and therefore a Bastard was *proximus Sanguinis* amongst these People, who were the best Expositors of that Law to whom it was first promulged, and all the Commentators upon this Law do allow the unlawful Issue to be incapable of inheriting.

But though the Marriage of the Uncle with the Niece is not forbidden by the Levitical Law, yet that of the Nephew with the Aunt, either by the Father or Mother's Side, is prohibited; and 2 Inst. 683.

so by Consequence the other must be so too, because it falls under the same Degree of Kindred with that which is forbidden by Nature.

It is prohibited by the Levitical Law for a Man to marry his Sister's Daughter; and it is no Objection to say, that a Bastard is not a Daughter: For tho' he is deprived of several Privileges by particular Laws, yet if there is any Morality in that Law, (which cannot be denied) it is morally as unlawful to marry a Bastard, as one born in lawful Wedlock; and it is so also in Nature, for the Levitical Law was grounded upon a natural as well as a political Reason to enlarge these Kindred, and unite their Families, for there are natural as well as legal Kindred; and if this shall not be expounded to fall under the Prohibition, that a Man ad proximum Sanguinis non accedat, then a Father may marry his Bastard Son.

The Court inclined not to grant a Prohibition. Sed Adjournatur.

S. C. 1 Salk.
344.
Post. 175.

Hussey versus Jacob.

Lond' ff. **W**illielmus Hussey queritur de Alexandro Jacob in Custodia Mar. Maresc. Dom. Regis coram ipso Rege existen. pro eo videl't quod cum Civitas London, in hoc Regno Angliæ est & a toto tempore cujus contrarium memoria hominum non existit fuit antiqua Civitas, cumq; etiam Villa de Hereford in hoc Reg. Angliæ est & a toto tempore supradicto fuit antiqua Villa, cumq; etiam habet & existit & a toto tempore supradict. habebatur & fuit quedam antiqua & laudabilis consuetudo inter Mercatores & alias Personas Commercio utentes in Hereford præd. residen. & Mercatores & alias Personas Commercio uten. in London præd. commoran. usitan. & approbat. videl't quod si aliquis Mercator vel alia Persona in Hereford præd. resi-

den. faceret aliquam Billam Excambii secundum consuetudinem Mercator. & eandem Billam Excambii alie Personæ Commercio uten. in London præd. commoran. direxit & per eandem Billam requisivit eundem Mercatorem vel aliam Personam Commer. uten. apud London præd. residen. in hujusmodi Billa Excambii nominat. cui eadem Billa Excambii sic direct. foret ad solven. aliquam denar. summam in hujusmodi Billa Excambii mentionat. alicui al. Mercatori vel alie Personæ Commercio uten. in eadem Billa Excambii nominat. ad aliquod tempus in hujusmodi Billa Excambii specificat. & quod si hujusmodi Mercator vel alia Persona apud Lond. præd. commoran. cui aliqua talis Billa Excambii sic direct. fuit hujusmodi Billam Excambii sibi

sibi sic ut praefertur direct. secundum consuetudinem Mercator. acceptavit tam huiusmodi Mercator vel alia Persona cui huiusmodi Billa Excambii sic fuit direct. per huiusmodi acceptationem onerabilis existit & a toto tempore supradicto onerabilis esse consuevit ad solven. huiusmodi denariorum summam in huiusmodi Billa Excambii mentionat. huiusmodi Mercatori vel alie Personae in huiusmodi Billa Excambii nominat. ad diem sive tempus in huiusmodi Billa Excambii appunctata. pro solutione inde secundum tenorem & effectum huiusmodi Billa Excambii cumq; praehonorabilis Dominus Chandois 21 die Octobris, Anno 1693. apud Hereford praed. existit. & Commercio uten. videlicet apud Lond. praed. in Paroch. beate Mariae de Arcubus [in Warda de Cheap] fecisset primam suam Billam Excambii gener. datam eisdem Die & Anno & eandem Billam Excambii praefat. Alexandro Jacob adtunc apud London praed. in Paroch. & Warda praed. residen. & commoran. & Commercio uten. direxisset & per eandem Billam Excambii praed. Dominus Chandois requisivit praefat. Alexand. Jacob ad solven. infra Mensem post visum Billa Excambii sui prime summam centum & viginti pecias. Auri [Anglice vocat. Guineas] praefat. Will'o Hussey per nomen Captain Hussey, praed. Dom. Chandois & Will'o Hussey adtunc & ibidem Commercio uten. idemque Wilhelmus praed. Billam Excambii postea

scilicet 28 die ejusdem Mensis Octobris, Anno supradicto apud London praed. in Paroch. & Warda praed. eidem Alexandro ostendebat & adtunc & ibidem praefat. Alexand. requisivit acceptare praed. Billam Excambii & solvere eidem Will'o praed. centum & viginti pecias Auri [Anglice vocat. Guineas] secundum tenorem Billa praed. & superinde praed. Alexander adtunc & ibid. sup. visum inde acceptavit praed. Billam Excambii secundum consuetudinem Mercator. praed. ratione cuius quidem acceptationis praed. Billa Excambii ac ratione praemissor. idem Alexand. secundum cons. praed. sic ut praefertur usitat. & approbat. onerabilis devenit ad solven. praefat. Will'o praed. centum & viginti pecias Auri in Billa Excambii praed. mentionat. secundum formam & effectum Billa praed. & praed. Alexander postea scilicet Die & Anno ultimo mentionat. apud London praed. in Paroch. & Warda praed. in cons. praemissor. praed. super se assumpsit & eidem Will'o adtunc & ibidem fideliter promisit quod ipse idem Alexander praed. 120 pecias Auri [Anglice vocat. Guineas] in Billa Excambii praed. mention. praefat. Will'o secundum formam & effectum Billa Excambii bene & fideliter solvere & contentare vellet, cumq; etiam praed. Alexander postea scilicet primo die Decembris, Anno Dom. 1693. apud London praed. in Parochia & Warda praed. indebitat. fuisset eidem Will'o in aliis centum & viginti peciis Auri [Anglice

[Anglice vocat. *Guineas*] iohannis centum & triginta & duas libras cum legalis monete Anglie pro tanta denario. Summa per eundem Will'm pro eodem Alexand. & ad special. instantiam & requisitionem ipsius Alexand. ante tempus illud soluit. erogavit. & contraxit. & sic inde indebitus existit. prout. Alexander in consideratione inde super se assumpsit & eidem Will'o adtunc & ibid. fideliter promisit quod ipse idem Alexander prout. 120 pecias Auri [vocat. *Guineas*] valoris 120 l. ult. mentionat. eidem Will'o cum inde requisit. esset bene & fideliter solvere & contentare vellet cumque etiam prout. Alexander postea scilicet eodem primo die Decembris Anno ult. supradicto apud London prout. in Paroch. & Warda prout. indebitat. fuisset prefato Will'o in al. centum & triginta & duabus libris similla legalis monete Anglie pro tanta denario. Summa per eundem Willielmum eidem Alexandro ad special. instantiam & requisitionem ipsius Alexand. ante tempus illud mutuo dat. & accommodat. & sic indebitat. existit. prout. Alexander in cons. inde super se assumpsit & eidem Will'o adtunc & ibid. fideliter promisit quod ipse idem Alexander prout. centum & viginti pecias Auri [voc. *Guineas*] ult. mentionat. eidem Will'o cum inde requisit. esset bene & fideliter solvere & contentare vellet cumque etiam prout. Alexander postea scilicet eodem primo die Decembris Anno ult. supradicto apud London prout. in Paroch. &

Warda prout. indebitat. fuisset eidem Will'o in al. tantum & viginti pecias Auri [vocat. *Guineas*] valoris centum & triginta & duas libras. Similla legalis monete Anglie pro tantum decto summa per eundem Alexandrum pro prout. Will'o & ad usum ipsius Will'a ante tempus illud habuit & recepit. & sic inde indebitus existit. prout. Alexander in consideratione inde super se assumpsit & eidem Will'o adtunc & ibidem fideliter promisit quod ipse idem Alexander prout. 120 pecias Auri [vocat. *Guineas*] ult. mentionat. eidem Will'o cum inde requisit. esset bene & fideliter solvere & contentare vellet. prout. tamen Alexander separal. promission. & assumptiones suas prout. in forma prout. factas minime curat. sed machinan. & fraudulenter intendit. eund. Will'm in hac parte callide & subdole decipere & defraudare prout. 120 pecias Auri [Anglice voc. *Guineas*] in prout. prima promissione superius mentionat. ad Mensen post visum Bille Exchanges prout. superius mentionat. seu prout. separal. depar. Summa in prout. secunda, tertia & quarta promissione superius mentionat. eidem Will'o non solvit. licet. ad separal. denarium summa in prout. secunda, tertia & quarta promissione superius mention. eid. Will'o solven. prout. Alexand. postea scilicet decimo die April' Anno Dom. 1694. & superius postea apud Lond. prout. in Parochia & Warda prout. per prout. Will'm requisit. fuit sed ill. ei hucusque solvere omnino recusavit

recusavit & adhuc recusat unde id. Will'us dicit quod ipse deteriorat. est & damnum habet ad Valentiam quadraginta librar. & inde producti scdam, &c. Et modo ad hunc diem, scil't diem Veneris prox. post Crastinum Sancta Trinitatis isto eodem termino usque quem diem præd. Alexander habuit licentiam ad Billam præd. interloquen. & tunc ad responden. coram Dom. Rege apud Westm. ven. tam præd. Will'us per Attorn. suum præd. quam præd. Alexander per Vincent Skeynes Attorn. suum & idem Alexander defen. vim & injuriam quando, &c. & quoad secundam, tertiam & quartam promissionem & assumptionem in Narratione præd. superius mentionat. idem Alexander dicit quod ipse non assumpsit super se modo & forma prout præd. Will'us superius versus eum queritur & de hoc ponit se super patriam, &c. & præd. Will'us inde similiter, &c. & quoad præd. primam promissionem & assumptionem in Narratione præd. super. mentionat. idem Alexander dicit quod ipse virtute Billæ Excambii præd. prima promissione & assumptione superius mentionat. & per ipsum ut præfertur fact. onerari non debet quia protestando quod præd. Dominus Chandos præd. tempore confessionis Billæ Excambii præd. seu unquam postea non fuit Persona Commercio uten', protestando etiam qd. præd. Will'us præd. tempore confessionis ejusdem Billæ Excambii non fuit Persona Commercio uten. prout præd.

Will'us per Narrationem suam præd. superius supponit pro placito idem Alexander dicit, quod post 29 diem Septembris, Anno Dom. 1694. & antea confessionem primæ Billæ Excambii, scil't 21 diem Decembris, Anno Dom. 1693. supradicto apud London præd. in Paroch. & Warda præd. prædictus Dominus Chandos & Will'us ludebant inter se cum al. ad quendam ludum [Anglice vocat. *Parard*] quodq; præd. Dominus Chandos adtunc & ibid. ad ludum il. ad unum tempus & ad unum coitum [Anglice a *Meeting*] perdidit præfat. Will'o supra mentionat. summam 120 Peciarum Auri [Anglice vocat. *Guineas*] quodque pro securitate solutionis earundem 120 Peciar. Auri per ipsum præd. Dominum Chandos præfat. Will'o ut præfertur perdit. idem Dominus Chandos postea, scil't 21 die Octobris, Anno Dom. 1693. supradicto, apud London præd. in Paroch. & Warda præd. primam suam Billam Excambii eidem Alexandro direxit & per eandem Billam Excambii præd. Dominus Chandos requisivit eundem Alexandrum ad solvendum ad mensem post visum Billæ Excambii prædicti præd. summam 120 Peciar. Auri [vocat. *Guineas*] præd. Will'o posteaque, scil't præd. 29 die Octobris, Anno ultimo supradict. super visum præd. primæ Billæ Excambii idem Alexander apud London præd. in Paroch. & Warda præd. prædictam Billam Excambii pro solutione præd. 120 Peciar. Auri acceptavit & super

in assumptis perit perit Will'us
per Narrationem pred. superius
suppositis quodam potestatis per-
tentis ac vigore statuti pred. in
eo casu edit. & provis. pred. pri-
ma Billa Excommuni per ipsum
Alexandrum ut presentur accep-
tat. & acceptatio. inde & pro-
missio & assumptio ipsius A-
lexandri per ipsum Alexand. ut
presentur fact. devenien. & fuer.
& modo sunt vacue & nullius
vigoris in lege & hoc paratus est
verificare unde pet. iudicium si
ipse victor Billa Excommuni pred.
per present. Dominum Chandos
contra formam statuti pred. ut
presentur det. & confect. & per
ipsum eund. Alexandrum in for-
ma pred. acceptat. offerri de-
beat. &c. & per Will'um dicit
quod ipse per aliquam per pred.
Alexandrum superius placitando
allegat quod priorem promissio-
nem & assumptionem pred. ab
actione sua pred. inde versus ip-
sum Alexandrum habere precludi
non debet quis dicit quod placi-
tum pred. per pred. Alexandrum
modo & forma pred. superius
placitat. materisque in eodem
content. minus sufficien. in lege
existunt ad ipsum Will'um ab acti-
one sua pred. inde versus pred.
Alexandrum habere. precluden.
ad quod quidem placitum ipse
idem Will'us necesse non habet
nec per legem text. tenetur aliquo
modo respondere & hoc paratus
est verificare unde pro defectu
sufficien. respon. in hac parte ipse
id. Will'us petit iudicium & dam-
na sua occasione non performatio-
nis pred. priore promissionis &

assumptionis sibi adjudicari. &c.
& pro causis narrationis in hac
parte secundum formam statuti
in eo casu edit. & provis. idem
Will'us ostendit & curie hic de-
monstrat has causas sequen. vi-
delicet quod placitum pred. attin-
xit solummodo ad generalem
exitum necnon est duplex per-
plex. incertum & carens forma
necnon minime respondens Nar-
rationem pred. & pred. Alexan-
dri quod placitum pred. per ip-
sum Alexandrum quoad priorem
promissionem & assumptionem
modo & forma pred. superius
placitat. materisque in eodem
content. bonum & sufficien. in lege
existunt ad ipsum Will'um ab acti-
one sua pred. inde versus ipsum
Alexandrum habere. precluden.
quod quidem placitum materiam-
que in eodem content. ipse idem
Alexander paratus est verificare &
probere prout Curia. &c. & quia
pred. Will'us ad placitum illud
non respondit nec il. hucusque ali-
qualiter dedicit ipse idem Alex-
ander ut prius petit iudicium &
quod pred. Will'us ab actione sua
pred. inde versus ipsum Alexan-
dram quoad priorem promissio-
nem & assumptionem habere. pre-
cludatur. &c. sed quia Curia dicti
Dom. Regis nunc hic de iudicio
suo de & super promissis reddend.
nondum advisatur dies inde dat.
est partibus pred. coram Dom.
Rege apud Westm. usque diem
prox. post. &c. de iudicio suo de
& sup. permittit il. audien. eo quod
Curia dicti Dom. Regis nunc hic
inde nondum. &c. & quoad
trian. tam exitum pred. inter
partes

perpetuo prode superius factum per Husley versus prefatum Alexan-
 derum quod ad inquisitionem deum Jacob reddi venit inde per
 que datus pater Willus Husley coram Dom. Rege apud Westm.
 sustinuit occasione Premissorum ad prefat. diem & qui nec, &c.
 prode unde peres pater in iudici ad fecogn, &c. quia tam, &c.
 um Cade se posuerit & contineat idem dies datus est a partibus
 iudicium inde pro prode Willus prode ibidem, &c.

Husley versus Jacob.

S. C. 1 Salk.
334

THIS was an Action on the Case brought upon a Bill of
 Exchange against the Acceptor, wherein the Plaintiff sets
 forth, That the Bill was drawn by my Lord Chandos upon the
 Defendant, for the Payment of 120 Guineas to the Plaintiff.
 Then he sets forth the Custom of Merchants, and that both the
 Drawer, the Plaintiff, and the Acceptor, were Persons using
 Trade and Merchandizing, and that the Defendant had not
 paid the Money, &c.

Vide 4 Mod.
409.
1 Lutr. 484,
487.

The Defendant by Protestation saith, That neither my Lord
 Chandos, or the Plaintiff, were Persons using Merchandize at the
 Time when the Bill of Exchange was drawn, or at any Time
 afterwards. Then he pleads, That after the making the Sta-
 tute of Gaming, and before the said Bill was given, my Lord
 Chandos, and the Plaintiff did play at Dice at a Game called
 Payard; and that my Lord at one Time and Meeting did lose
 120 Guineas to the Plaintiff, and that, for securing the Pay-
 ment thereof, he did draw the Bill of Exchange upon the De-
 fendant, who accepted the same; and that by Virtue of the said
 Statute the Acceptance was void in Law.

16 Car. 2.
cap. 7.
Vide ante 4,
5, &c. post.
331.

The Plaintiff demurred specially, and shewed for Cause, That
 this Plea did amount to the General Issue, and no more; and
 the Defendant joined in Demurrer.

For the better understanding this Case, it may be necessary
 to recite some Part of that Statute, (viz.) If any Person shall
 play other than for ready Money, and shall lose above 100 l. at
 one Time upon Ticket or Credit, the Loser shall not be bound
 to pay it; but the Contract for the same, and all Judgments, &c.
 and other Acts and Deeds, and Securities whatsoever for such Mo-
 ney, shall be void.

Mod. Ca. in
Law and Equ.
57, 58, 187.
See 9 Annæ,
c. 14. §. 5.

Those who argued against this Plea said, That the Statute
 of Gaming cannot be pleaded to this Action, because it is no
 Answer to the Custom of Merchants, so that the Declaration is
 true notwithstanding this Plea.

Bestres,

Defence, 'tis not alleged that the Money was lost upon Ticket or Credit, or that it was not paid down at that Time when it was lost; for in such Cases only the Statute is intended to bind. But by this Way of Pleading, the Defendant binds himself as though he himself were within the Purview of the Statute, which was made against deceitful, sly, and crafty Gaming, and therefore shall not have the Benefit of the consequential Part of the Law, which is the Quodvultum of the Contract.

But this Statute doth not hinder the Plaintiff from his Action, because he being a third Person, and not concerned in the Gaming, may promise the Payment of the Money upon a good Consideration.

As, if a Man lose above 100 l. at one Sitting, and give Judgment for the Payment, and a third Person doth promise the Winner, that in Consideration he will not take out Execution within a Year, that he will pay the Money: This is a good Promise, and will bind him, because it may have a reasonable Beginning; for probably the Loser would not plead to the Sci' fa, or take any Advantage of the Statute.

So if A. win above 100 l. of B. and at the same Time is indebted to C. in the like Sum, and then both A. and B. become bound to C. for the Payment of the Money, 'tis a good Bond, and not to be avoided by the Statute.

This Action being brought against the Acceptor, he must now answer upon a supposed Contract of his own, and not upon a joint Contract with another; for every Endorser undertakes severally for himself, and the Defendant in this Case hath undertaken to pay the Sum in Demand upon a subsequent Contract made by himself. Possibly my Lord Chandos might have taken Advantage of the Statute, but the Defendant cannot; for his Undertaking being subsequent to the Gaming, is neither within the Intent or Letter of the Law.

2. 'Tis not averred in the Plea, That the Plaintiff Husley did accept the Bill for securing the Payment of the Money lost at Play; and without such Averment, 'tis not within the Meaning of the Statute.

Econtra.

If this Case should not be within the Statute, because 'tis a new Undertaking, then it would easily be eluded by getting one to be bound for the Money lost at Play, which is a new Undertaking,

Carth. 269,
270.
1 Salk. 124,
125.
Comb. 4, 32,
152, 452.
Skin. Rep.
355, 343,
410.

ling for the Payment, and to the Statute would be of very little use.

1. As to the Custom of Merchants, it need not be averred as the fact in the Declaration; for there is Special Matter enough, which alters the Custom. It is true, there is a Bill set forth, which is alleged to be drawn according to the Custom of Merchants, but with this Impediment, That it was drawn as a Security for the Payment of Money won at Play, which Bill ought not to be taken by Law; so that though the Custom is averred, it is abrother by an Act of Parliament.

2. As to the second Objection, the Plea is, That Jacob did accept the Bill for the Sum for which it was drawn, which was for Money won at Play; it is a Contract for the Payment of such Money, which is held by the Statute.

Contra. As to the first Exception, That it is a Plea which does amount to the General Issue; a Man in many Cases may plead Special Matter to avoid the Plaintiff's Action, tho' he might give it in Evidence upon the General Issue; as in Debt upon a Bond against a Feme Covert, he may plead Coverture, or give it in Evidence upon Non est Factum.

2 Show.
Dixon ver.
Thompson.

The Law here pleaded is consistent with the Action brought against the Defendant which he hath confessed, but hath also shown Special Matter to avoid it.

It cannot be denied, but that if the Action had been brought against my Lord Chandos, the Drawer, upon the Refusal of Jacob to pay it, my Lord might have taken Advantage of the Statute, which is an Argument that the Defendant shall also take the same Advantage, because his new Contract stands upon the former Consideration, and it is but a farther Security for the same Money lost at Play; and his Acceptance of the Bill is an express Promise to pay it.

Now this Gaming must be either upon Tick or for ready Money; but it is plain it could not be for ready Money, for then the Loser would not have drawn this Bill for the Payment of it: Whereupon Judgment was given for the Defendant.

Carth. 376,
377.

Wilson versus Howard.

Hert. H. Edward Wilson nuper de Villa Sancti Albani in Com. prad. libul-

der, attach. suit ad respond. Johanni Howard de placito quare Vi & Armis, &c. domum ipsius
Z z
Johannis

Johannis Howard apud Villam Sancti Albani præd. fregit & intravit, & Bona & Catalla sua ad Valentiam decem Librarum æquæ & eisdem nuper invent. cepit & asportavit, & alia enormia exstunt ad grave damnum ipsius Johannis Howard, & contra pacem Domini Regis nunc, &c. & unde idem Johannes per Johannem Leigh Amorn. suum queritur quod Edwardus Wilson Vicarius septimo Die Octobris, Anno Regni Domini Reg. nunc, &c. Vi & Armis, &c. Domum ipsius Johannis Howard, apud Villam Sancti Albani præd. fregit & intravit, & Bona & Catalla sua videlicet viginti Scablos [Anglice

four Loads] cum ipsius Johannis Wilson ad Valentiam, &c. abduxit & eisdem nuper invent. cepit & asportavit totam transgressionem præd. vicario Vicario septimo Die Octobris, Anno Regni dicti Domini Regis septimo supradicto, & decimum septimum Diem Novembris tunc prox. sequen. diversis diebus & vicibus continuando & alia enormia exstunt ad grave damnum ipsius Johannis Howard & contra pacem, &c. unde dicit quod deteriorat. est & damnum habet ad Valentiam viginti Librarum & inde producit fecit, &c.

Wilson versus Howard.

Skin. Rep. 42,
641.

TRESPASS for taking four Loads of Wheat with a Continuando for a whole Month, there was Judgment in the Common Pleas by nil dicat, and a writ of Error brought: And the Error assigned were,

1. That the Vicarius Viginti Modios Tricici [Anglice Four Loads of Wheat] are infinite; for Modius signifies a Bushel, and its not possible in more four Loads of Twenty Bushels.

Vide 1 Sid.
319.
1 Lev. 210.
6 Mod. 38.
2 Salk. 638.

2. The Trespass is for breaking the Vicarius's House, with a continuando when Transgressionem for a Month; which cannot be, for a Man must have some Time to rest.

Recontra. To which it was answered, (viz.) As to the first Error assigned, the Anglice is hold, and then the Viginti Modios Tricici may be well understood.

21 H. 6. 43. a.
2 Roll. Abr.
549.
Comh. 193,
377, 427.

2. The Continuando shews, that the Taking was not all at the same Time, like the Case in the Year Book, 21 H. 6. where a Man was charged for taking six Cows, (viz.) Two Loads at a Time, with a Continuando diversis Diebus & Vicibus, from such a Day to such a Day, and held good: For a Trespass may be

be taken in taking such a Quantity of Corn which cannot be removed in one Day, and therefore the Continuando is to hold how it may come.

Where a Continuando is not well laid, and notice is not given, it shall be intended for that only which can be a Continuance, and so was the Opinion of the Court in this Case; for the taking the Corn is said to be on such a Day continuando Transgressionem præd. from that Day to such a Day, which is sufficient, and so Damages could not be given, for that and a Continuando may be laid quoad fructum domus, as well as Pedibus ambulando, but of that it was doubted: For if it had been continuando Transgressionem præd. generally, it had been well enough; but it is totum Transgressionem, which cannot be for breaking a House.

There was another Objection, (viz.) That the Defendant Bona & Cavalla aduoc & ibidem nuper invent. cepit, &c. which cannot be in one and the same Time.

To which it was answered, That the Words Nuper relates only to the Time of Declaring, but the Time is not material, for he can give in Evidence but on Taking. The Judgment was affirmed.

Rex versus Commings & al.

THE Defendants were indicted at the Sessions, for that they being chosen Overseers of the Poor of the Parish of Lynn for the Year 1693, and having taken upon them that Office, they & uterque eorum did collect and receive several Sums of Money for the Relief of the Poor, and did refuse to account within four Days after the End of the said Year; and after, other Overseers were nominated to give an Account to two Justices of the Peace of the Sums by them received, and to deliver over the same to the new Overseers, but converted it to their own Use, and did use other fraudulent Practices to deceive the Poor, &c. contra formam Statuti, &c.

This Indictment was removed into B. R. by Certiorari, and the Exceptions to it were,

1. That an Indictment will not lie for this Offence, for it is grounded on an Act of Parliament, which appoints the Overseers to account, and a Punishment for Refusing, (viz.) To be committed by two Justices of the Peace till they account, and

Vide 6 Mod.
38, 39
3 Salk. 638.
2 Mod. 353.
Tel. 126.

1 Sid. 319.
1 Ven. 224.
249, 363.
1 Lev. 212.
Ray. 396.

1 Salk. 177.
389.
6 Mod. 96.
Ante 96.

43 Eliz. c. 2
Paragraph, a.
Vide 2 Salk.
525, 531.

Vide 6 Mod.
86.

and pay what remains in their hands, there to remain without

Ball. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

So that this being an Offence made by a particular Statute, which was not so at Common Law, and breeding both the Offender should be punished, that must be the Remedy, and no other can be pursued.

2. If an Indictment will not lie for this Offence as set forth, it will not for the other fraudulent Practices mentioned in it, because 'tis too general: And so it hath been adjudged in like Cases, (viz.) Where a Man was indicted for being a Common Misdooer, it was held void without laying some particular Offence.

2 Roll. Abr. 79.

Carth. 256.

3. It is said, That being Overseers of the Parish of Lynn, they did collect several Sums, &c. but have laid no Venue where the Money was collected, neither is it mentioned what Sums were received.

Ca. in Law and Equ. 336. Fitzgib. 56, 57.

2 Roll. Abr. 81. Eliz. Mod. Ca. in Law and Equ. 1st. part, 329, 330. Comb. 374.

4. Two are indicted, and it is said, that they, & uterque eorum did receive Money, which they had not brought to account: This is likewise void for the Uncertainty, because the Act of one is not the Act of the other; as where four were indicted for using a Trade contra formam Statuti, setting forth that they & uterque eorum did use the Trade, it was quashed for this Reason, for the doing of one cannot be the doing of the other.

The Overseers are required by the Act to account, and their Refusal is a Contempt of the Law, for which they may be indicted; And as to that, there is no Difference when a Thing is enjoined, and when 'tis prohibited by a Statute, for when 'tis prohibited, the Party shall not only have his Action for the Injury done, but the Offender shall be punished at the King's Suit for the Contempt of his Law.

'Tis true, two Justices of Peace have Power to commit the Overseers refusing to account, which is a proper Means to come to the Right; but it doth not satisfy the King for the Contempt.

Then as to the Objection, That the Indictment doth not set forth what Sums were collected, 'tis not material, for the Offence is for not accounting.

And

And lastly, Though it is true, that two cannot be indicted for refusing to become Apprentices, because the Service of one cannot be the Service of the other Yet two may be indicted for a Cheat, and for several other Offences. Adjourn'.

Comb. 16.
Mod. Ca. in
Law and Equ.
1st Part, 164.

DITTON v. COLE

AN Action on the Case was brought for negligently keeping his Fire, by Action whereof the Plaintiff's House was burned, (viz.) In parietibus in partitionibus fenestris, in operibus ferrariis, & ornamentis ejusdem Domus.

And upon Demurrer, this Exception was taken to the Declaration:

That it was too general and incertain, for Damages could not be given for the Walls and Ornaments of the House.

As where Trespass was brought for taking diversa genera apparatus, or Trover for Goods cum aliis Implementis & Necessariis, not shewing what they are; this was held ill after a Verdict, for the Court cannot give Judgment for such incertain Damages.

Comb. 459.
Vide 7 Co. 13.
Cro. Eliz.
777, 784.
Ante 87.
4 Mod. 9.
Show. 310.
And Stat.
6 Ann. c. 13.
Skin. Rep.
142.
Comb. 306.
Ca. in Law
and Equ. 145.
Aley 9.
Cro. Eliz.
817.
Vide post.
324.

Econtra. It was argued for the Plaintiff, that the Action had been well brought without the Videlicet, for the enumerating the Particulars was but Matter of Aggravation and Inference; and this being an Action wherein Damages are to be recovered, they may be divided, and the Plaintiff ought to recover for that which is well laid in the Declaration, and that is, for negligently keeping his Fire. The Plaintiff had Judgment.

A a a D E

Termino Paschæ.

Anno 8 W. 3. in B. R. 1696.

Chamberline *versus* Harvey, Mich. 7 W. 3. Rot. 123.

Memorand. quod die Mercurii prox. post tres septiman. Sancti Michaelis isto eodem Termino, coram Domino Rege apud Westmonast. ven. Willoughby Chamberline per Godfridum Woodward Attorn. suum & protulit hic in Cur. dicti Domini Regis tunc ibidem quandam billam suam *versus* Robertum Harvey Armig. in Custod. Marechal, &c. de placito transgressi. Et sunt pleg. de proseguend. ff. Johannes Doe & Richardus Roe quæ quidem billa sequitur in hæc Verba: ff. London ff. Willoughby Chamberline Ar. queritur de Roberto Harvey Ar. in Custod. Mar. Marechal. Dom. Regis coram ipso rege existens. de eo quod idem Robertus, primo Die Septembris, Anno Dom. Millesimo sexcentesimo nonagesimo quinto, Vi & Armis, &c. un. Æthiopem [Ang. vocat. a Negro] ipsius Wil-

loughby pretii centum Librarum legalis monete Angliæ apud London præd. (viz.) in Parochia Beate Mariæ de Arcubus in Ward. de Cheape, cepit & abduxit & possedit Æthiopem præd. a præd. primo Die Septembris, usque exhibition. hujus billæ ad tunc & ibidem detinuit & custodivit. Ita quod ipse idem Willoughby usum & beneficium Æthiopis prædict. per totum tempus prædict. totalit. perdidit & amisit & al. enor. eidem Willoughby ad tunc & ibid. intulit contra pacem dicti Dom. Regis nunc ad dampnum ipsius Willoughby centum & quinquagint. Librarum & inde producit Sec-tam, &c.

Et præd. Robertus per Robertum Stone Attorn. suum ven. & defend. vim & injuriam, quando, &c. & dicit quod ipse non est inde culpabilis modo & forma prout præd. Willoughby *versus* eum superius queritur, & de

de hoc ponit se super patriam & prad. Willoughby inde similiter, ideo ven. inde jurat. coram Domino Rege apud Westm. Die Jovis prox. post Cras. Animar. & qui nec, &c. ad recogn', &c. quia tam, &c. idem Dies datus est partibus prad. ibidem, &c. postea continuat. inde processus inter partes pradict. in placito prad. per jur. posit. inde inter eos in respect. coram Domino Rege apud Westm. usque Diem Jovis prox. post quinden. Sancti Martini nisi dilect. & fidelis Domini Regis Johannes Holt Mil. Capital. Justiciar. Domini Regis ad placita in Cur. ipsius Domini Regis coram ipso Rege tenend. assign. prius Die Mercur. prox. post Quinden. Sancti Martini apud Guildhall, London. per formam Statuti ven. pro defen. jur', &c. ad quem Diem coram Domino Rege apud Westm. venit predict. Willoughby per Attorn. suum prad. & prefat. Capital. Justic. coram quo, &c. misit hic Record. suum coram eo habit. in hac Verba, Postea Die & Loco infra content. coram Johanne Holt Mil. Capital. Justic. Domini Regis ad placita in Cur. ipsius Domini Regis coram ipso Rege tenend. Assign. Associat. sibi Johanni Ince Gen. per formam Statuti, &c. ven. tam infracominat. Willoughby Chamberline Ar. quam infrascript. Robertus Harvey Ar. per Attorn. suos infraccontent. & jur. jurat. unde infra sit mentio exact. quidam eorum (viz.) Thomas Sericole, Ric'us Martin. Sam. Stone, Benj.

111172

Hodgson, Jeremias Barrat, & Nathaniel Spinlow, ven. & in jur. ill. jurat. exist. & quia resid. jur. ejusdem jure non comperuer. ideo al. de circumstantibus per Vic. Civitat. prad. ad hoc elect. ad requisition. prad. Willoughby Chamberline ac per mandat. Capital. Justic. prad. de novo apponuntur quorum nomina panell. infrascript. assilantur secundum formam Statut. in hujusmodi casu edit. & provis. ac jur. sic. de novo apposit. (viz.) Thomas Pool, Ric'us Martin, Thomas Ward, Johannes Warfson, Ph'us Brewster, & Ric'us Chauncey exact. similiter ven. qui ad veritat. de infra content. simul cum al. jur. prad. prius impanel. lat. & jurat. dicend. elect. triat. & jurat. dicunt super sacrum suum quod quidem Ed'us Chamberline diu ante infrascript. tempus quo, &c. seisit fuit de quadam Plantation. in Insula de Barbadoes in le West-Indies in partibus transmarinis in Domin. suo ut de feodo & de quibusdam Servis Ethiopicis [Anglice ~~Regre~~ ~~Slaves~~.] Servis eidem Plantation. spectan. & pertinen. & prad. infrascript. Servus Ethiopos diu ante infrascript. tempus quo, &c. infra Insulam prad. nat. fuit de Parentibus Ethiop. [Anglice ~~Regre~~ ~~Slaves~~.] Servis eidem Plantation. spectan. & pertinen. & quod diu ante infrascript. tempus quo, &c. scilicet, Vicefimo nono die Aprilis, Anno Domini Millesimo Sexcentesimo sexagesimo octavo per quendam Willielmum Willoughby deputat. Guber-

Gubernator, concilium & assem-
 blation, representant Inhibis illius
 existens in ea parte legitime Au-
 thorizati commissionarij apud In-
 sulam illam inactione fuit in his
 Anglicani verbis sequen. Barba-
 dos. In Act declaring the Ne-
 gro Slaves of this Island to
 be real Estates. Whereas a
 very considerable Part of the
 Wealth of this Island consists
 in our Negro Slaves, with-
 out whose Labour and Service
 we should be utterly unable to
 manage our Plantations here,
 thereby relieving our Estates,
 and bringing that considerable
 Increase of Revenue which
 this Place affords to his Ma-
 jesty's Treasures, as well here
 as in England; And whereas
 some Law Suits have risen, and
 other great Inconveniencies
 have followed, where Divers Per-
 sons dying Intestate have left
 the Right and Interest of their
 Negro Slaves to be by Law dis-
 puted between their Heirs, Exe-
 cutors, and Administrators,
 wherein the various Judg-
 ments and Affections of sever-
 al Courts, or Juries, have
 sometimes found for one, and
 at other Times for the other:
 For a full Remedy of these
 Inconveniencies, and to the
 Intent that the Heirs, and
 Widows who claim Dower,
 may not have here Lands with-
 out Negroes to manure the
 same; and also, that the
 Condition, Right, and Inter-
 est of Negroes to all other
 Ends and Purposes may be

fully known and determined;
 the Deputy-Governor, Coun-
 cil and Assembly, being willing
 that all Ambiguities herein
 should be removed, and the
 Law in this Case be declared
 and put in a Certainty, have
 ordained and enacted, and it is
 hereby ordained and enacted by
 the Deputy-Governor, Council
 and Assembly, and by the Au-
 thority of the same; That
 from and after Publication
 hereof, all Negro Slaves in
 all Counties of Jurisdiction, and
 other Places within this Island,
 shall be held, taken, and ad-
 judged to be Estates Real, and
 not Chattels, and shall de-
 scend unto the Heirs or Widows
 of any Person dying, according
 to the Manner and Custom
 of Lands of Inheritance held
 in Fee-simple, provided always,
 that no Person selling or a-
 lienating any of his or her
 Negroes, is hereby held or ob-
 liged to cause such Sale or A-
 lienation to be enrolled, as is
 accustomed to be done, and re-
 quired by the Laws of this
 Island, as in all other Real
 Estates, any Usage, Custom
 or Law to the contrary not-
 withstanding: Provided this
 Act, or any Thing therein con-
 tained, shall not be taken and
 deemed to extend unto any
 Merchant, Factor, or Agent,
 bringing Negro Slaves to this
 Island, and having the Con-
 signments of any Slaves un-
 der them; but that in all Re-
 spects, they, their Executors,

Admi.

Administratores et alii, nunc
habeant, possint, aut enjam fieri
Slaves, et Negros, in such
Condition as they might have
done before the coming of this
Act, until Sale of such Slave
or Slaves hath been made in
the Island.] Prout per Actu.
ill. plenius apparet quodque
præd. Edward. Chamberline diu
ante præd. tempus quo, &c. a-
pud Insulam præd. de simili Statu
suo de &c. in Plantation. & Servis
Æthiop. præd. ad inde pertinen-
obit se'it. per & post cujus mor-
tem una tertia Pars Plantation. &
Æthiop. servorum præd. unde Æ-
thiop. Servus in narr. præd. men-
tionat. fuit un. descendebat Ma-
rie Vid. & Relict. præd. Edwardi
Chamberline nomine dotis suæ
per leges Insule præd. & reversio
præd. tertius Partis & præd. al-
duz tertius Partes descendebat
præfat. Willo. Chamberline ut Fil.
& Hæred. prædict. Edwardi &
sic se'it. existens. præd. Maria po-
stea & diu ante tempus quo, &c.
cepit in virum suum quendam
Johan. Witham Mil. per quod
præd. Johannes Witham se'it. fuit
in jure Uxor. suæ præd. de una
tertia Parte Plantation. & Æthi-
op. Servor. pro termino vite Ux-
oris suæ præd. ac præd. Johannes
Witham sic se'it. existens. infrano-
minat. Æthiop. verum Nativum
diu ante infrascript. tempus quo,
&c. scil't. in Anno Regni Caroli
Secundi nuper Regis Angliæ, &c.
Tricesimo Sexto infra hoc Reg-
num Angliæ duxit & postea
præd. Æthiop. Servus superius
mentionat. remansit in Servitio

ipsius Johannis infra hoc Reg-
num Angliæ per spacium diver-
sor. Annor. extunc & ante præd.
tempus quo, &c. juxta ritus
Ecclesiæ Anglicanæ sed absque
notitia sive consensu præd. Wil-
loughby Chamberline ibidem
baptizat. fuit quodque præd.
Johannes Witham postea & post
mortem præfat. Uxor. ejus sed
diu ante præd. tempus quo, &c.
infra hoc Regnum Angliæ Æ-
thiop. Servum præd. a Servitio suo
penitus detrusit necnon postea &
ante præd. tempus quo, &c. idem
Æthiop. Servus alios hujus Reg-
ni Angliæ subdit. infra hoc Reg-
num Angliæ deservisset ac in-
frascript. tempore quo, &c. infra
hoc Regnum Angliæ retent. fuit
in actual. Servitio præd. Roberti
Harvey capiend. de præfat. Ro-
berto secundam ratam sex Libra-
rum per Ann. pro salario suo in ea
Parte sed utrum sup. tot. materiam
præd. per Jur. præd. in forma
præd. compert. præd. Robertus
Harvey sit culpabil. de transgress.
infra specificat. necne Jurator.
præd. penitus ignorant & pet. ad-
visament. Cur. hic de præmissis.
Et si super totam Materiam præd.
per Jur. præd. in forma præd.
compert. videbitur Justic. & Cur.
hic quod præd. Robertus Harvey
sit culpabil. de transgress. ill.
tunc idem Jurator. dicunt super
factum suum præd. quod præd.
Robertus Harvey est culpabil.
de transgress. præd. prout præd.
Willoughby Chamberline inte-
rius versus eum queritur. Et as-
sidunt dampna ipsius Willough-
by occasione transgress. præd.

ultra mil. & Custag. ill. ad
quingagint. & tres Solid. &
quatuor Denar'. Et si super to-
tam materiam præd. per Jur. præd.
in forma præd. compert. videbi-
tur eisdem Justic. hic quod præd.
Robertus Harvey non sit culpa-
bil. de transgress. præd. tunc

iidem Jurator. dicunt super sa-
crum suum præd. quod præd.
Robertus Harvey, non est cul-
pabil. de transgress. præd. prout
ipse idem Robertus Harvey in-
terius placitando allegavit &
quia, &c.

1 Lev. 201.

Vide 3 Lev.

336, 337.

3 Keb. 785.

Ray. 16.

2 Salk. 666,

667.

Cro. Car. 19,

391, 545.

Cro. Eliz.

126, 545.

Cro. Jac. 262,

463.

Trespas for taking a Negroe Slave of the Value of One hundred Pounds: Upon Not guilty pleaded, the Jury found a Special Verdict at the Guildhall, London: *It. That be- fore the Trespass committed, one Edward Chamberline was seized in Fee of a Plantation in Barbadoes, and of certain Negroe Slaves thereunto belonging; that the Negroe now taken was born within the said Island, of Negroe Parents, being Slaves belonging to the said Plantation. They find an Ordinance made by the Deputy Governor, Council, and Assembly of the Representatives in the said Island, That the Negroe Slaves there shall be real Estates, and shall descend to the Heir or Widows as Lands of Inheritance, &c.*

That Edward Chamberline died seized, &c. after whose Death one third Part of the Plantation and Negroe Slaves (whereof this Negroe was one) came to Mary his Widow and Relick, as her Dowry, and the Reversion of the said Third, and the two other Thirds did descend to the Plaintiff, as Son and Heir of Edward Chamberline. That the said Mary did afterwards marry Sir John Witham, who thereupon was seized in her Right for her Life of one third Part of the Plantation and Slaves; and being so seized, he did, in the 36th Year of King Charles II. bring this very Negroe into England, where he continued in the Service of the said Sir John Witham several Years; that he was baptized here, but without the Ministry or Consent of the Plaintiff; that after the Death of the said Mary, Sir John Witham turned this Negroe out of his Service, who afterwards served several other Masters here, and at the Time when the Trespass was supposed to be committed, was in the Service of the Defendant, and had for his Wages six Pounds by the Year. But whether, upon the whole Matter, the Defendant is Guilty of the Trespass, they refer to the Court.

A Case like this never happened before.

There

There were three Questions made upon this Verdict :

1. Whether upon this finding there was any legal Property vested in the Plaintiff?

2. If any such Property be vested in him, then whether the bringing this Negroe into England be not a Manumission, and the Property thereby dissolved?

3. Whether an Action of Trespass will lie for taking a Man Pretii centum Librarum.

As to the first, Tho' the Negro Slave hath but a very harsh Sound in a free and Christian Country, yet perfect Bondage hath been allowed in such Places; and the Power which doth naturally arise to the Lord over such Bondmen or Slaves, is by Reason of his supplying them with Food and Raiment during their Lives, as a Recompence for their Labour; such is the Usage of the Island of Barbadoes. And the Jury have found a Law there, which makes these Slaves Part of the real Estate, and this Negroe was born of Negroe Parents there. Now the Children of such Parents are Slaves as well as they; so it was amongst the Romans, where both Parents were Aliens, the Children were so too.

Vide March
12.
Hob. 283.
Ray. 16.
2 Lev. 201.
3 Lev. 336.
2 Salk. 667,
&c. ante.

This Ordinance made in Barbadoes, being subject to the Crown of England, hath the same Force there as an Act of Parliament hath here. Now if this had been the Case of a Villain here, the Jury have found enough to make him Regardant to a Manor; in which, by the Law of this Land, the Lord had so absolute a Property, that if he be taken away, the Party detaining him gained no Property in him; for then the Writ de Nativio habendo must be brought against him, but it is only directed to the Sheriff to take him where-ever he may be found, &c.

Vide 2 Salk.
411, 412.

An Action of Trover will not lie, but where the Plaintiff hath a Property in the Thing demanded. Now it cannot be denied, but that Trover will lie for a Negroe; for so was the Case of, &c.

It is true, there is no Judgment entered in that Case, but that may be the Fault of the Attorney in not bringing in the Postea.

2. Nothing here found doth amount to a Manumission or Enfranchisement.

Manu-

S. 204.

Manumission is defined by Littleton to be, when the Lord makes a Deed in his Willain to enfranchise him, this is one kind of Manumission; the other is, when the Lord doth some Act, which, in Judgment of Law amounts to make his Willain free, as by making a Feoffment in Fee to him, and delivering Seisin accordingly, &c. It is true, he may have several temporary Privileges whereby he may be exempted from the Seisin of the Lord, as entering into Religion, &c. but can in no Case be enfranchised but where the Lord is an Actor; and even in such Case, if the Lord himself had enfranchised him by Deed, cum tunc sequela sua procreati & procreandi, this was not a sufficient Manumission of such Children which he had before the Execution of the Deed without special Words, because they were Willains in Possession at that Time.

Co. Lit. 137. b.
3 H. 7. 14. a.
Br. Tit. Villenage, placito, 26.

But here is nothing of the Lord's Consent found in this Writ, but the contrary.

Then bringing him into England by Sir John Wicham will not make him free, because he was a Trespasser in so doing; for he ought not to have removed him from the Plantation to which he was regardant. It therefore taking him from the Plantation was Tortious, then the finding that he continued in his Service, and that he was afterwards turned away, will not amount to a Manumission.

The chief Question then is, Whether Baptism without the Privilege of the Lord will amount to a Manumission?

Now if a bare Consent, without any other Act of the Lord, will not be sufficient to make his Willain free, so as to divest himself of that Property which he had in him; then a Fortiori, what the Willain doth without the Consent of the Lord, cannot acquire a Manumission.

Co. Lit. 136. b.

That a bare Consent alone is not sufficient, appears by my Lord Coke's Comment on Littleton, and the Authorities there cited in the Margin; That if a Bishp regardant to a Manor marries a Freeman without the Licence of the Lord, who afterwards makes a Feoffment of the Manor, and then her Husband dies, the Lord shall still have the Bishp, and not the Feoffee.

If Baptism should be accounted a Manumission, it would very much endanger the Trade of the Plantations, which cannot be carried on without the Help and Labour of these Slaves; for the Parsons are bound to baptize them as soon as they can give a reasonable Account of the Christian Faith; and if that would make them free, then few would be Slaves.

Econtra.

Exonra.

It was argu'd on the other Side, That it was against the Law of Nature for one Man to be a Slave to another. 'Tis true, a Man may lose his Liberty by a particular Law of his Country, or by being taken in a War, for there he owes his Life to those that preserve him, or where a Man voluntarily sells himself for Sustenance, or Almshouse; but no such Thing is found in this Case, and nothing shall be presumed but what is in Favour of Liberty.

'Tis by the Constitutions of Nations, and not by the Law of Nature, That the Freedom of Mankind hath been turned into Slavery: Thus saith Bracton, *Fiunt etiam servi liberi homines captivitate de jure gentium*. But our Laws are called *Libertates Anglie*, because they make Men free; and therefore even in the Time of Villenage here, the Lord had not such an absolute Property over his Slave, but that in some Cases that very Slave might have an Action against his Lord, as an Appeal for the Death of his Father; so where the Lord is indebted to the Testator of his Villain, he may bring an Action against him as Executor; so may the Kisse have an Appeal of Rape, being ravished by her Lord. Lib. 1. c. 6. Litt. §. 189. 190.

If Slavery in Barbadoes, and Villenage here, were the same Sort of Servitude, the Plaintiff may be seized of this Negro as a Villain in Gross, or as Regardant to the Plantation; for there were but two Sorts of Villains here, either in Gross, or Regardant to particular Manors.

Now this cannot be a Villain Regardant to the Plantation; for then the Plaintiff and his Ancestors must be seized of this Negro, and his Ancestors Time out of Memory of Man, which could not be, because Barbadoes was acquired to the English within Time of Memory; and he cannot be a Villain in Gross, Litt. §. 181, 182. because 'tis found that he was born of Parents belonging to the Plantation.

But if the Plaintiff hath any Property in this Negro, he must either have an absolute or qualified Property in him at the Time of the Trespass supposed to be committed.

He could not have an absolute or general Property, because by Magna Charta, and the Laws of England, no Man can have such a Property over another.

And if he had only a qualified Property, then an Action of Trespass will not lay, but an Action per quod servitium amisit.

Ccc

But

But if the Plaintiff had any Right to the Servitude of this Negro, that Right is now dissolved by his coming into England; for the Ordinance made in Barbadoes will not make him so Regardant to the Plantation there, as to go to the West, because that is only *Lex loci*, and adapted to that particular Place (as the Law of Stannaries in Cornwall, and extends only to that County) so long as he is occupied in Service on that Plantation; and if he be brought into another Country where that Law hath no Effect, that amounts to a Manumission; so that the bringing him into England, discharges him of all Servitude, or Bondage, especially being turned out of the Service of his Master, and not allowed Sustainance by him, for Food and Cloathing are the only Recompence for Servitude.

§. 302.

But being baptized according to the Rite of the Church, he is thereby made a Christian, and Christianity is inconsistent with Slavery. And this was allowed even in the Time when the Popish Religion was established, as appears by Littleton, for in those Days, if a Villain had entered into Religion, and was professed, as they called it, the Lord could not seize him; and the Reason there given is, because he was dead in Law, and if the Lord might take him out of his Cloister, then he could not live according to his Religion.

The like Reason may now be given for Baptism, being incorporated into the Laws of the Land; if the Duties which arise thereby cannot be performed in a State of Servitude, the Baptism must be a Manumission.

That such Duties cannot be performed is plain, for the Persons baptized are to be confirmed by the Diocesan when they can give an Account of their Faith, and are enjoined by several Acts of Parliament to come to Church: And it cannot be an Objection of any Weight to say, That though he was baptized, yet it was not by the Consent of the Lord, because he is enjoined by the Law.

But if the Lord hath still an absolute Property over him, then he might send him far enough from the Performance of those Duties, (*viz.*) into Turkey, or any other Country of Infidels, where they neither can or will be suffered to exercise the Christian Religion.

4 Infl. 46.

The Law is so careful of the Liberties of Men under its Protection, that the King himself, who hath so great a Right to the Duty and Service of his Subjects, cannot send any one out of England against his Will to serve in any other Place, even in his own Dominions, for this, my Lord Coke saith, would be perdere Patriam; and therefore the Lord could not send a Villain

tain in Cross out of the Kingdom, because the King had a Right in him.

Thus it is also in the Case of Apprentices, who, though they voluntarily submit themselves to serve their Masters for a certain Number of Years, yet they cannot be sent out of the Kingdom, tho' it be to their Masters House, and in his Service, unless it be the Agreement, or the Nature of the Apprenticeship is such.

Captives taken in War are under the most slavish Degree of Servitude; and those to whom they are subjected have thereby the highest Right in them, because it is lawful not only to dispose of them at their Pleasure, but even to destroy them. But it is observed amongst the Turks, That they do not make Slaves of those of their own Religion, though taken in War; and if a Christian be so taken, yet if he renounce Christianity, and turn Mahometan, he doth thereby obtain his Freedom.

And if this be a Custom allowed amongst Infidels, then Baptism in a Christian Nation, as this is, should be an immediate Emancipation to them, and they should thereby acquire the Privileges and Immunities enjoyed by those of the same Religion, and be entitled to the Laws of England.

3. This Action will not lie for taking a Man, pretii centum librarum. First, because 'tis not found that either the Widow or the Heir was in Possession of this Plantation, and Negro Slaves at the Time of the Action brought; for if this Negro be Part of the real Estate, then Sir John Wytham was a Disseisor by bringing him into England, and a Disseisor cannot have an Action of Trespass before a Re-entry, because the Freehold is in the Disseisor.

The Aggrancy of a Villain, or a Nefse, is the Fault of the Lord; and therefore Anno 7 R. 2. it was held, If a Stranger marry such Nefse, not knowing to what Lord she belonged, he is not a Trespasser, which is this very Case in Point. Adjournatur. Afterwards, in Hillary Term, Judgment was given for the Defendant, that the Bill shall abate; for the Court were of Opinion, That no Action of Trespass would lie for the taking away a Man generally, but there might be a special Action of Trespass for taking his Servant, per quod Servitium amisit.

Roberts versus Withered.

Mid. ff. **F**Ran'cus Roberts qui tam pro Dom' Rege quam pro seiplo in hac parte se-

quitur queritur de Thoma Withered in Custod. Mar. &c. de Placito quod reddat. dicto Dom. Regi

Brownl. 1.
Pl. 67.
Hob. 134.
idem Coventry
Woodall.

Molloy de
jure Mariti-
mo, 355.

Roll. Abr.
2 Pl. 553.

Fira. Abr.
Tit. Bar.
Placito 240.

Carth. 396.
397.

1 Salk. 233.

Regi & eidem Fran. Triginta & sex Cados [vocat. **Batrels**] Oleorum Olivarum [Anglice **Oil**] continen. in toto tresdecim Tonnas [Anglice **Tuns**] Oleorum Olivarum præd. ad Valentiam lenc. quingent. & viginti librarum ac etiam sexaginta & novem Pipas [Anglice vocat. **Pipes**] Vini continen. in toto Triginta & quinque Tonnas [vocat. **Tuns**] Vini præd. ad Valentiam Mille & quadraginta librarum quos ab eodem Dom. Rege & præfat. Fran. injuste detinet pro eo videl't quod cum post primum diem Aprilis, Anno Dom. Millesimo sexcentesimo sexagesimo primo, scil't inter decimum nonum diem Septembris, Anno Dom. 1694, & diem exhibitionis hujus Billæ, scil't decimo die Aprilis præd. bona importat. fuer. per præd. Thomam Withered, & per ipsum habit. & possessionat. & ad usum suum proprium conv. & deposit. in quadam nave sive vase [vocat. **the Stella**] a Genoa in partibus transmarines in hoc regnum Angliæ, videl't ad Radcliffe in Com. Mid. præd. infra portum London, eadem nave sive vase [vocat. **Stella**] dicto tempore importacon. bonorum præd. non existen. nave sive vase vere & sine fraude pertinen. ad populum Angliæ, Hiberniæ, Walliæ, vel Villæ Berwici super Tweed, aut aliquam eorum ut verus possessor. [Anglice **Owner**] & Proprietor inde & cujus Magister & tres quart. partes nautarum ad minus fuer. Anglici prædictaque nave vel vase non existen. nave vel vase forinsecæ de edificatione. Genoa [Anglice **the Buist of Genoa**] seu istius Regionis vel loci unde bona præd. fuer. crescentia production. sive Manufactur. vel talis portus ubi bona præd. potuer. solummodo esse aut maxime usualiter fuer. primo eskipat. pro transportatione & unde Magist. & tres quart. partes nautarum ad minus fuer. ejusdem regionis sive loci contra formam statuti in hujusmodi casu nuper edit. & provit. occasione quorum quidam præmissorum necnon vigore statuti præd. bona præd. forisfact. devenier. & existunt & quælibet inde parcel. forisfacta devenit. & existit. unde actio accrevit. dicto Dom. Rege & eidem Fran. qui tam, &c. ad exigen. & haberi. de eod. Thomam pro præd. Dom. Rege & seipso præd. bona in forma præd. forisfact. præd. tamen Thomas licet sepius requisit', &c. præd. bona in forma præd. forisfact. dicto Dom. Rege & eidem Fran. qui tam, &c. nondam deliberavit sed præd. bona dicto Dom. Rege & eidem Fran. qui tam, &c. hucusque deliberare omnino contradixit & adhuc contradicit ac injuste detinet unde idem Fran'cus qui tam, &c. dicit quod deteriorat. est & damnum habet ad Valentiam duo mille librarum & inde producit sectam, &c.

Roberts

Roberts *versus* Withered.

AN Action of Detinue was brought for Goods forfeited by virtue of the Statute 12 Car. 2. [Entituled, An Act for encouraging and encreasing of Shipping and Navigation] in the eighth Paragraph whereof it is enacted, amongst other Things, That no Olive-Oil, or Wines, shall from and after the first Day of April, in the Year 1667, be imported into England, Ireland, Wales, or Town of Berwick upon Tweed, in any Ship or Ships, Vessel or Vessels whatsoever, but in such as do truly, and without Fraud, belong to the People thereof, or of some of them, as the true Owners and Proprietors thereof, and whereof the Master and three Fourths of the Mariners at least are English, except only such Foreign Ships and Vessels as are of the Built of that Country or Place of which the said Goods are the Growth, Production or Manufacture respectively, or of such Port where the said Goods can only be, or most usually are, first shipped for Transportation, and whereof the Master and three Fourths of the Mariners at least are of the said Country or Place, under the Penalty and Forfeiture of Ship and Goods; one Moiety to his Majesty, and the other Moiety to him or them that shall inform, seize, or sue for the same in any Court of Record.

Upon Non Detinet pleaded, there was a Verdict for the Plaintiff. And now it was moved in Arrest of Judgment, that an Action of Detinue will not lie but where the Defendant comes by the Goods either by delivering or by finding, and where the Plaintiff hath an antecedent Right, neither of which is this Case; and it is not enough to say, that the Statute vests a Property in him who first sueth for the Forfeiture, because by the express Words thereof the Right is not attached but by Seizure or Information.

Most of the Statutes which give Penalties of Forfeiture, do direct how they shall be recovered, scilicet by Action of Debt, Bill, Plaint, &c. but where a Law giveth a Property by Information or Seizure of the Goods, an Action of Detinue will not lie till that be done, because it cannot be a wrongful Detainer of that to which the Party had no Right.

If Genoa be the Place of the Growth of the Goods, then the Shipping them there is not an Offence within the Act; and they do not say, that the Goods are not of the Growth, Production or Manufacture of Genoa, or that it was not the Place

D d d

where

S. C. 1 Salk.

223.

12 Car. 2.
cap. 18.

Detinue.

Vide 11 Co.

89.

1 Rol. Rep.

118, 119,

161.

2 Rol. Rep.

275, 296.

Hard. 353.

Noy 12.

Cro. Jac. 39.

Cro. El. 457.

2 Danv. 510.

where they were usually shipped at the Time of the making of the Act.

Hard. 217. The Proceedings upon such popular Statutes have usually been by Way of Information: So was the Case of Pitcher and Jones in Michaelmas Term, in the thirteenth Year of King Charles II. in the Exchequer, which was an Information for importing two Bags of Spices from Holland, being of the Growth of Asia, Africa, or America, that not being the Place where such Goods were first most usually shipped for Transportation, contra Formam Statuti. There was a Judgment for the Plaintiff, but it was arrested, because it was not alleged, that the Goods were not of the Growth of Holland; though the Information did set forth, that they were of the Growth of Asia, &c.

2 Roll. Abr.
202. Bishop
of Coventry
and Litch-
field's Case.

Now it is not material where such Goods were usually shipped either before or since the making the Act; for they ought to aver, that Genoa was not the usual Place of shipping them at the Time when the Act was made; like the Case where the King granted to a Bishop, that the Manor and Lands belonging to his Bishoprick should be free for ever from such a Forfeiture. The Bishop could not claim any Freedom for any other Lands, but such which he had at the Time of the making the Grant.

Econtra.

Comb. 361.

But those who argued for the Plaintiff, said, that nothing remained to be answered, upon reading the Act and the Declaration, but the first Question, which was, Whether an Action of Detinue would lie or not in this Case? And it was insisted, that it would, for if the Act had given only the Penalty of 100 l. one moiety to the King, the other to him who shall sue for the same, and doth not say in what Action, it will not be denied but that Debt would have been the proper Action in such Case for the Informer to recover his moiety.

That there was no Difference between Debt and Detinue for such a Forfeiture; for the Informer had an antecedent Property in neither.

But in this Case there is a Forfeiture immediately vested in the King and Party, and if one may have an Action, the other may also sue for his moiety.

Now it is no Argument to say, because some Persons have chose to proceed by Way of Information upon Forfeitures on Penal Statutes, therefore an Action of Detinue will not lie for such a Forfeiture.

Co

To prove that a Forfeiture was vested, this Case was compared by the Court to a Replevin, which doth suppose an antecedent Property, as much as an Action of Detinue; for it is a Rule, That the Plaintiff must have the Property of the Goods in him at the Time when they were taken; but yet the Lord shall have a Replevin of the Cattle of his Willain being distrained, though he had no Property in them at the Time of the Distress made: For my Lord Coke was of Opinion, That the bringing a Replevin is a Claim in Law, and that the Property is vested thereby in the Plaintiff.

1 Inst. 145. b.
F. N. B. 69. b.

So by navigating contrary to the Act, the Property is divested out of the former Doners; and by this Action now brought, it is vested in the Plaintiff, and therefore he may bring Detinue for it: So Judgment was given for the Plaintiff by the whole Court, without any farther Argument.

Wolfe versus Davison.

S. C. 2 Salk.
219.

Villa Novi Castr. **M**emorand. sup. Tinam, ff. quod al' scil't. Termino Paschæ ult. præterit. coram Domino Rege apud Westm. ven. Henricus Wolfe per Thomam Matthews Attorn. suum & protulit hic in Cur. dicti Dom. Regis nunc ibidem quandam Billam suam versus Benjamin Davison Mercator. nuper Vic. Vill. prædict. in Custod. Mar', &c. de placito debiti & sunt pleg. de Personis, scil't Johannes Doe & Richardus Roe quæ quidem Billa sequitur in hæc verba, ff. Villa Novi Castr. præd. super Tinam, ff. Henricus Wolfe queritur de Benjamine Davison Mercator. nuper Vic. Villæ præd. in Custod. Mar. Marefc. dicti Domini Regis coram ipso Rege existen. de placito quod reddat ei centum & octo Libras legalis monetæ Angliæ, quas ei debet & injuste detinet pro eo, videl't, quod cum idem Henricus

al's scil't. Termino Sancti Michaelis, Anno Regni Domini Willelmi nunc Regis & Dominae Mariæ nuper Reginae Angliæ, &c. secundo, in Cur. dictorum Domini Regis & nuper Dominae Reginae coram Henrico Polexfen Mil. & Sociis suis, tunc Justiciar. Domini Regis & nuper Dom. Reginae de Banco apud Westm. in Com. Midd. per con. ejusdem Cur. recuperasset versus quendam Georgium Dale Gen. pro nomen Georgii Dale nuper de Gatesherd in Com. Dunelm. Gen. tam quoddam debitum centum & sex Libr. quam quadragint. Solid. qui eidem Henrico Wolfe in eadem Cur. adjudicat. fuer. pro dampnis suis quæ habuit occasione detentionis debiti illius unde idem Georgius convict. fuit prout per Record. & Process. inde in eadem Cur. Domini Regis nunc de Banco apud Westm. præd. residen. liquet manifeste super

per quo præd. Georgius pro eo quod ipse non ven. coram Justic. dictor. Domini Regis nunc & nuper Domine Regine de Banco apud Westm. præd. ad satisfaciend. eidem Henrico de debito & Dampnis præd. in forma præd. recuperat. unde ut prefert. convict. fuit in exigend. posit. fuit ad utlegand. in London & ea occasione postmodum scil't. die Lune prox. ante. Festum S. Agathæ Virginis. Anno secundo supradicto ad Hustings de Communibus Placitis ad tunc tent. in Guildhall Civitatis London ad sectam ipsius Henrici utlegat. fuit prout per Record. & Process. utlegat. illius in præd. Cur. dicti Domini Regis nunc de Banco residen. plenius & manifeste liquet super qua quidem utlegaria versus præfat. Georgium in forma præd. promulgat. idem Henricus Wolfe postea scil't. decimo tertio Die Aprilis. Anno Regni dictor. Domini Regis & nuper Domine Regine, &c. quarto pro citiori obtention. debiti & dampnor. præd. prosecut. fuit extra præd. Cur. dicti Dom. Regis & nuper Domine Regine de Banco quoddam breve dictor. Domini Regis & nuper Domine Regine de Capias utlegat. versus præd. Georgium tunc Vic. præd. Villæ Novi Castri super Tinam direct. per quod quidem breve dictus Dominus Rex & nuper Domina Regina eidem Vic. Villæ Novi Castri præd. super Tinam præd. præceper. quod præd. Georgium ad sect. ipsius Henrici ut præfertur utlegat. ubicunque in Bal-

liva ipsius Vic. tam infra libertat. quam extra inveniri contingeret caperet & eum salvo Custod. ita quod haberet corpus ejus coram Justiciar. dictor. Domini Regis & nuper Domine Regine apud Westm. in Cras. Ascen. Dom. tunc prox. sequen. ad faciend. & Recipiend. quod eadem Cur. dictor. Domini Regis & nuper Domine Regine consi. in ea parte & quod haberet ibi breve illud quod quidem breve idem Henricus Wolfe postea & antea retorn. brevis illius, scil't. quarto Die Maii. Anno Regni dictor. Domini Regis & nuper Domine Regine, &c. quarta supradicto, apud Vill. Novi Castri super Tinam præd. in Com. ejusdem Villæ deliberavit cuidem Josepho Atkinson ad tunc Vic. Vill. præd. existen. in forma Juris exequend. virtute cujus quidem brevis præd. Josephus Atkinson postea & ante retorn. brevis illius, scil't. septimo Die Maii. Anno quarto supradicto, tunc Vic. Vill. præd. existen. apud eandem Villam in Com. ejusdem Vill. cepit & arrestavit præd. Georgium & ipsum in Custod. sua in execution. pro debito & dampnis præd. ad tunc & ibidem habuit & eum in Prisons dictor. Domini Regis & nuper Domine Regine ibidem detinuit & custodivit usque in exitum ipsius Josephi ab Officio suo Vic. Villæ præd. prædictoque Georgio sic sub Custod. præd. Josephi Atkinson in execution. pro debito & dampnis præd. in forma præd. existen. idem Josephus Atkinson postea, scil't. decimo tertio

Die

Die Octobris Anno quarto supra-
dict. ab Officio suo Vic. Vill.
præd. apud præd. Vill. Novi
Castri super Tinam debito modo
amotus fuit & postea scil't eodem
decimo tertio Die Octob. Anno
quarto suprad. præd. Benjamin in
Officium Vic. ejusdem Vill. apud
præd. Vill. Novi Castri super
Tinam debite elect. & constitut.
fuit. Ac præd. Josephus At-
kinson in dicto ejus exit. ab Offi-
cio suo Vic. Vill. præd. debito
modo deliberavit eidem Benja-
min Davison & in Custod. suam
præd. Georgium in prifona præd.
sic ut præfertur detent. in Exe-
cution. pro debito & dampnis
præd. in forma præd. videlicet a-
pud Vill. Novi Castri super Ti-
nam præd. idemque Benjamin ut
Vic. Vill. præd. prædictum Geo-
rgium in prifona præd. sub Cu-
stod. sua adtunc & ibidem in
execution. pro debito & damp-
nis præd. recepit habuit & deti-
nuit dictoque Georgio sic in Cu-
stod. ipsius Benjamin Vic. Vill.
præd. ut præfert. existen. in execu-
tion. pro debito & dampnis præd.
in forma præd. detent. existen. i-
dem Benjamin postea scil't vicesi-
mo Die Augusti, Anni Regni dict.
Domini Regis & nuper Dom.
Reginæ quinto, apud Vill. Novi
Castri super Tinam præd. (eodem
Benjamin adtunc Vic. Vill. præd.
existen.) præd. Georgium à Pri-
fona præd. extra Custod. ipsius
Benjamin ad largum quo voluit
ire & evadere voluntarie permi-
sit sine concessu voluntat. vel as-
sensu ipsius Henrici eodemque
Henrico Wolfe de debito &

dampnis præd. vel aliqua inde
parcell. minime satisfact. per
quod actio accrevit eidem Hen-
rico Wolfe ad exigend. & ha-
bend. de præd. Benjamin præd.
centum & octo Libr. præd. ta-
men Benjamin licet sæpius requi-
sit, &c. præd. centum & octo
Libr. eidem Henrico Wolfe non-
dum solvit sed ill. ei hucus-
que solvere omnino contradixit
& adhuc contradicit ad damp-
num ipsius Henrici Wolfe trigin-
ta Libr. & inde producit sectum,
&c.

Et modo ad hunc Diem, scil't,
Diem Veneris prox. post Graf.
Sanctæ Trinitatis isto eodem
Termino usq; quem Diem præd.
Benjamin habuit licenc. ad Billam
præd. interloquend. & tunc ad re-
spondend', &c. coram Domino
Rege apud Westm. venerunt tam
præd. Henricus per Attorn. suum
præd. quam præd. Benjamin per
Nich'um Hardinge Attornat.
suum & idem Benjamin defendit
vim & injuriam quando, &c.
& dicit quod ipse non debet
præd. Henrico præd. centum &
octo Libras nec aliquem inde
Denar. modo & forma prout
præd. Henricus superius inde ver-
sus eum narravit, & de hoc po-
nit se super patriam, & præd.
Henricus inde similiter, &c. Ideo
ven. inde Jurat. coram Domino
Rege apud Westm. Die Mercurii
prox. post tres septiman. Sanctæ
Trinitatis & qui nec, &c. ad re-
cog'. &c. qui tam, &c. Idem
dies datus est partibus præ-
dict. ibidem, &c. postea con-
tinuat. inde Process. int. par-
tes

tes præd. de placito præd. per
Jur. post. inde inter eos in re-
spond. coram Domino Rege
apud Westm. usque Diem Mer-
curii prox. post Tres septimanas
S. Michaelis extunc prox. se-
quend. nisi Justic. Domini Regis
ad Assizas in Com. Vill. Novi
Castri super Tinam capiend. as-
sign. prius Die Lune vicesimo
secundo Die Julii, apud Guild-
hall Vill. Novi Castri super Ti-
nam in Com. ejusdem Villæ per
formam Statuti, &c. ven. per
defend. Jur., &c. Ad quem Diem
coram Domino Rege apud
Westm. ven. partes præd. per
Attorn. suos præd. & præfat. Ju-
sticiar. ad Assizas coram quibz
&c. mil. hic Record. suum co-
ram eis habet. in hæc verba,
sc. Postea die & loco infra con-
tent. coram Edwardo Nevill Mil.
un. Justic. Domini Regis de
Banco & Johanne Turton Mil.
un. Baron. Scaccarii dicti Domi-
ni Regis Justiciar. ipsius Domini
Regis ad Assizas in Com. Vill.
Novi Castri super Tinam capiend.
assign. per formam Statuti, &c.
ven. tam infranominat. Henricus
Wolfe quam infrascript. Benja-
min Davison per Attorn. suos
infracentent. & Jur. Jurat. unde
infra fit mentio exact. simil. ven.
qui dicunt super sacrum suum qd.
præd. Henricus recuperavit. ver.
infranominat. Georgium Dale de-
bitum & dampna in narration.
ipsius Henrici infrascript. mentio-
nat. modo & forma prout per ean-
dem narration. supponitur quodq;
dictus Georgius superinde ad lec-
tam & prosecution. ipsius Hen-

rici utlegat. fuit modo & forma
in narration. illi specificat. & quod
idem Henricus super inde profes-
cut. fuit breve de Capias utlegat.
in dict. narration. mentionat. ac
illud infranominat. Josepho At-
kinson Vic. Vill. Novi Castri su-
per Tinam infrascript. deliberavit
qui dictum Georgium virtute
brevis præd. cepit & arrestavit
modo & forma prout in eadem
narration. continetur quodque
idem Vic. dictæ Villæ ipsum
Georgium in Custod. sua pro &
super breve illud habuit & eum
in Prisons Domini Regis & nu-
per Dom. Reginae ibidem deti-
nuit & custodivit prout lex po-
stulat ac in exitu suo ab Officio
suo Vic. Vill. illius debito mo-
do deliberavit præfat. Benjamin
(Vic. ejusdem Vill. sic ut in dic-
ta narration. continetur existen.)
& in Custod. sua præd. Georgium
in Prisons præd. sic ut præfertur
detent. ex causa præd. quodque
idem Benjamin ut Vic. Vill. præd.
præd. Georgium in Prisons præd.
sub Custod. sua adducit & ibi-
dem recepit habuit & detinuit
prout lex postulat dictoque
Georgio sic in Custod. ipsius
Benjamin in forma præd. detent.
existen. idem Benjamin Vic.
Vill. præd. ut præfertur existen.
eundem Georgium in Prisons
præd. extra Custod. ipsius Ben-
jamin ad largum quo voluit li-
bere ire & evadere voluntarie
permisit sine assensu ipsius Hen-
rici eodemque Henrico de debito
& dampnis præd. vel aliqua inde
parcel. minime satisfact. prout
idem Henricus in narration. sua
præd.

præd. interius allegavit sed Juratores præd. ulterius super sacrum suum præd. dicunt quod præd. Henricus nullam fecit petitionem alit. quam in dicta narratione ipsius Henrici ad onerand. præfat. Georgium in execution. pro debito & dampnis præd. per eundem Henricum versus præfat. Georgium in forma præd. recuperat. & utrum præd. Georgius sic ut præfertur ad Prosecution. præd. Henrici virtute brevis præd. de Capias utlegat. de & super iudicio præd. sic ut præfertur capt. & arrestat. ultra Annum & Diem post Judicium illud reddit. legitime fuit vel esse potuit in execution. ad Sectam ipsius Henrici pro dampnis præd. sine aliqua expressa petition. per ipsum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. necne idem Juratores penitus ignorant. & inde petunt advisament. Cur. hic. &c. & si videbitur eidem Cur. hic quod præd. Georgius sic a prosecution. præd. Henrici virtute præd. brevis de Capias utlegat. ut præfert. capt. & arrest. ultra Annum & Diem post iudicium præd. redditum legitime fuit vel esse potuit in execution. ad sectam ipsius Henrici pro debito & dampnis suis præd. sine aliqua expressa petition. per ipsum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. tunc Jur. præd. dicunt super sacrum suum præd. qd. præd. Ben-

jamin debet præd. Henrico infra script. centum & octo Libr. in forma qua idem Henricus interius inde narravit & assidunt dampna ipsius Henrici occasione detentionis debiti illius ultra mis. & custag. sua per ipsum circa sectam suam in hac parte apposit. ad sex Denar. & pro mis. & Custagiis ill. ad quadraginta Solid. sed si videbitur dict. Cur. præd. quod præd. Georgius sic ad prosecution. præd. Henrici virtute brevis præd. de Capias utlegat. ut præfertur capt. & arrestat. ultra Annum & Diem post iudicium præd. reddit. legitime non fuit nec esse potuit in execution. ad sectam ipsius Henrici pro debito & dampnis suis præd. sine aliqua expressa petition. per ipsum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. tunc Juratores præd. super sacrum suum præd. dicunt quod præd. Benjamin non debet præfat. Henrico præd. centum & octo Libr. nec aliqu. inde Denar. prout ipse dictus Benjamin interius inde placitando allegavit & quia Cur. dicti Dom. Regis nunc hic de iudicio de & super præmissis reddend. nondum advisatur Dies inde datus est partibus præd. coram Dom. Rege apud Westm. usque Diem prox. post de iudicio suo inde audiend. eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c.

B. C. 1 Salk.
319.

Debt on an
Escape.
Vide 7 Co.
88, 89.
Cra. Eliz.
706, 707.
Cra. Jac. 361.
1 Rol. 810,
895.
1 Leon. 263.
1 Sid. 380.
Post. 413,
416. & infra.

Wolfe versus Davison.

DEBT against the Sheriff for an Escape, wherein the Plaintiff sets forth, That he had obtained a Judgment in the Court of Common Pleas against one Dale for 160 l. and Costs, and the said Dale not appearing to satisfy the said Judgment, was outlawed at the Suit of the Plaintiff, who thereupon sued forth a Capias Utlegatum against him, directed to the then Sheriff of Newcastle; and that the Plaintiff, before the Return of the said Writ, delivered it to one Joseph Ackinson then Sheriff of the said Mill, who by Virtue thereof arrested the said Dale, and detained him in Prison for the said Debt and Damages, till the said Ackinson was discharged from his Office of Sheriff, that the Defendant was afterwards Under-Sheriff, and the said Dale was delivered to him in Custody, and in Execution for the said Debt and Damages; and that afterwards he suffered him to escape, the said Debt not being paid.

Upon Nil debet pleaded, the Jury find a Special Verdict: sc. They find that the Plaintiff had obtained a Judgment against the said Dale for the said Debt and Damages; they find the Outlawry, and the Capias Utlegatum, and the Arrest upon it; and that the said Dale was in Custody of the Defendant, then Sheriff of Newcastle; and that he voluntarily suffered him to escape, the said Debt not being paid; then they make a Special Conclusion, That if Dale so taken a Year and a Day after the said Judgment recovered against him could be in Execution for the said Debt and Damages, without any express Prayer to charge him in Custody; then they find for the Plaintiff, &c.

It was argued for the Plaintiff, That when a Man was outlawed after Judgment, the Capias Utlegatum is the proper Process, and then the Plaintiff is at an End of his Suit; and therefore there can be no Default in him for not continuing his Process, so as to have the Prisoner brought into Court; and then upon Prayer of the Defendant to be committed in Execution at his Suit.

Post. 202.

1 Sid. 380.
Comb. 373.
374.
Yelv. 19, 20.
Cra. Eliz. 652,
706, 850.
Bridg. 7.
Moore 567.
Hob. 57, 115.
Sec. supra.

But admitting there was any Laches in the Plaintiff, or discontinuing the Process, yet if the Party be in Execution upon a Capias Utlegatum after Judgment, he is in Execution at the Suit of the Plaintiff, if he please; for tho' the Outlawry be in the King's Name, yet it is at the Suit of the Party, and for his Benefit: And the Sheriff must take Notice of the Law,

Laws, That he hath him in Custody for that Purpose unde Convictus est; for these are the Words in the Writ.

If the Defendant promise to pay a Debt in Consideration of Forbearance to prosecute a Capias Utlegatum, this is good in Law, which proves that an Outlawry is at the Suit of the Party; for such a Promise would be void, to stay any Process at the Suit of the King.

In the Fifth Report, there is a Case in Point, (viz.) Layton brought an Action of Debt against Walwyn and had Judgment, and then he was outlawed, and taken upon the Capias Utlegatum, and escaped: Whereupon the Action was brought against Garnon the Sheriff; and it was resolved, That at Common Law, if there be an Outlawry after Judgment in Debt, and the Party is taken upon the Capias, there is an End of the Plaintiff's Suit; and if he do Laches be in him in continuing his Process, he shall be in Execution at his Suit, if he will: For it is but reasonable, That if the King shall have a Benefit at the Suit of the Party, that the Party should have a Benefit at a Suit of the King.

This Case was abridged in Michaelmas Term, in the thirtieth Year of the Queen; and three Years afterwards in the same Term, Popham and Fenner seemed to be of another Opinion in an Action of Debt brought against an Administrator, upon a Judgment had against the Intestate. The Defendant pleaded, That the Intestate was outlawed after the Judgment, and taken upon the Capias, and died in Prison; and upon Demurrer to the Plea, those two Judges held that he was not in Execution at the Suit of the Plaintiff without his express Prayer, and the Court award it: But Justice Gawdy was of a contrary Opinion in that Case.

And according to his Opinion and the Resolution in Garnon's Case, there have been subsequent Judgments in this very Point, That when the Party is taken upon the Capias Utlegatum, he shall be in Execution for the Plaintiff, if he will; although his Body was never brought into Court.

This Case came in Question again in this Court in Michaelmas Term, in the 20th Year of King Charles II. It was Debt upon an Escape, wherein the Plaintiff declared, That he recovered a Judgment in the 13th Year of that King, that the Party was outlawed the 15th, and taken upon the Capias the 18th Year of the same King, and escaped: But he had not declared that he was in Custody, and prayed to be in at his Suit, without which his Imprisonment upon the Capias did not make him in Execution at his Suit; for it may be, he was not

Cro. Ells. 999.
Yelv. 19.
Jennings ver.
Harley.

Garnon's Case.
6 Rep. 88.
Cro. El. 707.
idem. 1 Roll.
810, 895.
Moore 556.

Shaw ver.
Cuttriss.
Cro. Ells. 850.
Moore, Pl.
cito 817.

Bridgm. 6.
More versus
Sir George
Reynell idem,
2 Cro. 619.
Larch 200.

Sid. 380.
Buckland ver.
Kelland.

contented with that, but intended to have another Execution than his Body.

But the Judgment in this Case is not reported, only the Opinion of Popham and Fenner is there cited, that he shall be in Execution at the Suit of the Party until he disclaim it.

Bridgm. 7.

Cro. Jac. 545,
620, 657.

If the Party be taken upon a Capias pro fine, he shall not be in Execution after a Year and a Day at the Suit of the Party without Prayer: But there is a Difference between that and this Case; for here it appears by Verdict, that the Plaintiff sued out the Capias for the Recovery of his Debt; and it appears plainly, that he intended to have the Body of the Party in Custody.

Econtra. It was admitted by those who argued on the other Side, That if the Escape had been within the Year after he was taken by the Capias, that the Plaintiff should have an Action of Debt against the Sheriff for an Escape; and the Reason is, because within the Year the Plaintiff might have brought a *Ca. Sa.* against him, and charged him in Custody, but after the Year he hath lapsed his Time, and is driven to a *Sci. Fac.* and therefore he shall not be then in Execution at his Suit without continuing the Process; he is in at the Suit of the King to answer the Contempt of his Laws, and so it would have appeared if the Sheriff had returned a *Cepi Corpus* upon the Capias Utlegatum; therefore something must appear upon Record, to make him in Execution at the Suit of the Party.

Dalb. 214.

Anre 201.

When the Defendant is taken upon the Capias Utlegatum, there is an End of the Party's Suit, as to any other Process to be sued by him, for he cannot have a *Sci. fac.* or any other Process upon that Judgment; and so it was at Common Law, if there had been any Stay of Process after the Year and Day; therefore it ought to be continued.

It is affirmed, that he is in Execution of the Party, nolens volens.

Fitzgib. 265,
266.

It is true, the Sheriff is bound to keep his Prisoners in Custody, but not under equal Penalties; for in some Cases an Action of the Case only will lie against him for an Escape, and sometimes an Action of Debt, where the Plaintiff will recover both his Debt and Damages: But here an Action of the Case only will lie against the Sheriff.

The Resolution in Garnon's Case will not come up to this, for the Words are, If the Defendant be taken upon the Capias Utlegat. at the King's Suit, no Laches being in the Plaintiff in continuing his Process, he should be in Execution for the Plaintiff.

it if he would; 'tis not said with Prayer, or without Prayer, neither is the Year and Day mentioned there.

Neither is the Case in *Bridgman* an Authority for the Plaintiff, for that was an Action of the Case brought against the Sheriff for an Escape of the Party taken upon a *Capias Utlegatum*, which is an Argument that they took the Law to be otherwise at that Time; for if the Prisoner had been in Execution at the Suit of the Party and escaped, they would have brought an Action of Debt, and not an Action on the Case. Bridgm. 6, 7.

The like Action on the Case was brought against the Sheriff of London for an Escape by *Frost*, where the Defendant was in Custody upon a *Capias Utlegatum* sued after a Year; and there it was agreed, That he could not be in Execution at the Suit of the Party without Prayer; but because he was discharged from his Imprisonment, without finding Sureties to satisfy the Plaintiff according to the Statute, the Plaintiff was prejudiced thereby, and therefore an Action on the Case would lie against the Sheriff. 5 Rep. 89.
Frost's Case.
1 Leon. 263.
Bridg. 7.

But the Court were of Opinion, That it was in vain for the Plaintiff to sue out an Outlawry if he had no Benefit thereby, when the Party was taken upon the *Capias* without continuing the Process; for to what Purpose should he take out a *Sci' fa'* after Judgment when the Party cannot be found, and nothing can be done upon it? Therefore Judgment was given for the Plaintiff. 5 Edw. 3.
Cap. 12.

Rex versus Cranfeild.

THE Defendant was indicted at the Sessions held for the Borough of Hatfeild, for speaking these Words, *Al. The Mayor and Aldermen of Hatfeild are a Pack of as great Villains as any who rob upon the Highway, and we will take away their Charter.* He was found Guilty of speaking these Words. Comb. 13, 46.
65, 66, 414.
Carrh. 14, 15.

It was moved in Arrest of Judgment, and several Exceptions taken.

1. This being tried at a Sessions of a particular Borough, they should have shewed what Authority they had to hold the Sessions being in a private Place, either by Prescription or Charter, which was omitted.

2. The Words are not indictable, for they are of Heat and Passion, for which the Defendant ought to be bound to his Good Behaviour, but not indicted.

In

In Easter Term, in the 8th Year of King Charles the Second, one Burford was indicted in this Court for these Words spoken to him at the Justice of the Peace: If That none of the Justices of the Peace did understand the Statutes of Excise, except such a one, [naming him] and truly he did neither well understand them, nor most of the Parliament-men who made them. And this Indictment was quashed.

3. It is said, Jurantes pro Domino Rege presentant, it should have been pro Domino Rege & Burgo predict. presentant.

Rek versus Inhabitants of Lisley.

2 Salk. 487.

Vide 2 Bull.
349, 358.
Blackerby's
Cases, p. 32.
Comb. 287,
286, 380.

AN Order of Settlement was made by two Justices of the Peace, to remove one Elizabeth Sinkwell, late of Lisley, Single-woman, and William her Son, to the Parish of Morton-Hampstead, in which Order the Cause assigned was, because that by Fraud and Collusion of the Parish of Lisley, he was delivered of the said William Child in the Parish of Morton.

It was objected against this Order to quash it, because it did not appear that the Child was lawfully settled in the Parish of Lisley, or that he was a Parishioner there at the Time he was delivered at Morton; they only said, Elizabeth Sinkwell, late of Lisley, Single-woman; which is but a Description of the Person, and an Addition of the Place, and not a sufficient Allegation that he was an Inhabitant there, or that the Child was settled there.

Mod. Ca. in
Barr. and Equ.
176.
Ca. in Law
and Equ. 271.

It appears by the Order, That the Child was born at Morton, and the Order prima facie makes a Settlement in that Place, nothing appearing in the Order to make him an Inhabitant elsewhere; and they cannot send him back to a Place where he never was.

2. The Reason of the Removal is too general, *viz.* That he was delivered at Morton by Fraud and Collusion of the Parish of Lisley.

As to the first Objection, it was answered, That the Order recites her to be late of the Parish of Lisley, Single-woman; which is a sufficient taking Notice, that she was an Inhabitant of that Parish.

As to the second Objection, it was said, That the Justices are not bound to shew a Reason why they make such an Order to remove

remove her; and therefore if they assign a Cause incertainly, that shall not quash an Order.

The Court inclined, that she ought to be asseged to be a legal Inhabitant in the Parish of Lisley; but would not quash the Order, because it was nine Years since it was made; sc. ever since October 1691. Carth. 397.

Stanford *versus* Chamberlaine.

Ejectment tried at the Assizes, and a Verdict for the Plaintiff, the Judgment ought not to be sign'd till the Rules are out, which will be in four Days after the Postea returned, which happened in this Case to be the 6th of May: The Plaintiff got his Judgment signed on the very Day, but it was not executed till after the 6th Day; so that the Defendant had Time enough to bring a Writ of Error, or make any Thing in Arrest of Judgment: Yet the Court held, That the signing the Judgment was irregular, it being before the Day allowed by the Rules of the Court; and tho' it was taken out afterwards, that was not material; therefore the Judgment was set aside, and the Party had Restitution.

Stephens *versus* Squire.

An Action was brought against Squire an Attorney, and two others, for appearing for the Plaintiff without a Warrant: The Cause was carried down to be tried at the Assizes; and the Defendant did promise, That in Consideration the Plaintiff would not prosecute the Action, that he would pay 10l. and Costs of Suit. And now an Action was brought against the Defendant upon this Promise. Ccm. 2.

The Question was, Whether this was a void Promise by the Statute of Frauds, being made in Behalf of another, and not in Writing? Which Statute enacts, That no Action shall be brought to charge the Defendant upon any special Promise to answer for the Debt, Default, or Mis carriage of another Person, unless it be in Writing. Fitz. 2. 202, 203.

But the Court were of Opinion, That this cannot be said to be a Promise for another Person, but for his own Debt, and therefore not within this Statute.

Richards versus Hill.

3 Mod. 48,
49.
Show. 64.
3 Lev. 133.
Comb. 9, 43.
Skin. Rep.
316, 389,
390.
Carth. 84,
116, 117.

Vide 1 Sid.
298.
1 Lev. 190.
Nell. Lurv.
29.
2 Salk. 562.

AN Action of the Case for diverting a Water-course, in which the Plaintiff declared, That he was seized of a Water-mill to him and his heirs, Secundum cons. Decanatus de Woolverhampton, and so prescribed for a Water-course, &c. and that the Defendant intending to deprive him of the Profit of the said Mill, did divert the Water ab antiquo cursu suo, per quod he could not Molare in fact. There was a Verdict for the Plaintiff.

It was moved in Arrest of Judgment, for that a Copyholder cannot prescribe in a Free Estate, and the Court could not take Notice of any other Estate the Plaintiff had by this Declaration; he should have left out Secundum cons. Decanatus; for how can he be so seized without shewing what that Custom was?

2. He doth not say, that he diverted the Water from the Mill, but from its ancient Course, per quod, &c.

3. The Matter of his Damages is laid insensibly, for the Gift of the Action is, That he had a Mill, out of which he had Profit by Grinding: Now the Word Molare is insensible, and there is a proper Word for Grinding.

Ca. in Law
and Equ. 158,
300, 301,
302.

The first Objection was over-ruled by the Court, for if the Plaintiff was seized of an Estate in Burrough English, that had been a customary Estate, because he hath it by the Custom of the Manor, and in such he may prescribe.

As to the second Objection, it was held, That the Word Molare being insensible, no Damages could be given for it; and that the Declaration had been good, if that Part of it had been left out: So that the Plaintiff had his Judgment.

Rex versus Cowper.

Indictment against the Defendant, setting forth, That there was a War betwix Lewis the French King; that during the Continuance of that War, the Defendant did hire a Boat for twenty Guineas, falso, malitiose & proditorie, to assist the King's Enemies;

Enemies; that the Boat so hired was brought to the Shore in order to embark him and others, where he was taken. This Matter was all found by Verdict.

It was moved in Arrest of Judgment, That this was not an Offence at Common Law; for then any Man, which shew an Intention to do an unlawful Thing will be a Fault; as if a Man hire a House, with an Intention to set up an unlawful Trade.

If the Fact itself doth not import any malicious Design, then the finding of the Jury will not alter the Nature of it.

If then there is nothing in this Indictment which labours of an Offence at Common Law, there is nothing prohibited by any Statute; for an Intention to do an unlawful Act is no Crime by either Law.

In this Case it was not so much as said, That the Defendant endeavoured to go beyond Sea without the King's Licence.

Econtra.

To which it was answered, That it was a Crime to hire a Boat to assist the King's Enemies with an open and manifest Attempt, by visible Acts so to do.

As if a Man prepare a Plate of the Breadth of the Broad Seal, and by some plain Act his Intention should appear, that he designed to have counterfeited it, and is taken before his Design was brought to Perfection: This does not amount to high Treason, but it is a Misdemeanor.

It is an innocent Act to lie in a Hedge; but if it be with an Intention to attempt the Queen-Consort, and that appear, it is a high Crime.

An Intention to fight a Duel is a Misdemeanor, and punishable by Fine and Imprisonment; and therefore, if a Challenge be sent to another, tho' the Parties never fight, yet both he who sent and he who carried the Challenge, are punishable according to the Rule which is mentioned by my Lord Coke, Quando aliquis prohibetur, prohibetur & omne per quod devenitur ad illud. sid. 168.
Rex versus
Darey and
Collins.

The Knowledge and Concealment of Treason is Disposition thereof, which is punished by Imprisonment during Life, and forfeiting of the Goods and Profits of Lands during Life. Now since the Law inflicts so high a Punishment upon the Concealment of a Treason, it cannot be a Question, but the bare Intention to commit so high a Crime, is punishable likewise at Common Law. Hale's P. C.
1st part 371
to 374, 708.
Hawk. P. C.
1st part,
c. 20, 59.
2d part c. 25.
§ 145. c. 13,
25.

It

It is no Argument to say, That because the Defendant is not guilty of the highest Offence, therefore he is guilty of none; for there are Gradations in Law which vary the Offences of Men, and proportion their Punishments to these Crimes.

Curia. The very Intention to commit Treason is regarded in Law; and any Preparation to assist the King's Enemies is a Prejudice to the Publick, and therefore an Offence at Common Law.

1 Lev. 146.

1 Sid. 230.

2 31.

5 Mod. 206.

Hawk. P. C.

1st part,

c. 25, 38. §. 18. and c. 67. §. 1.

and Equ. 1st part 92.

Our Actions are govern'd by Intentions, as qualified by them; so that in divers Cases the Intention makes the Act more or less criminal: Whereupon the Judgment was affirmed, and the Defendant fined 100 Marks, and committed till paid.

Hale's P. C. 1st part, 229, 429, 508, 509, 532, 561. Mod. Ca. in Law

Keat *versus* Barker.

AN Action was brought against the Defendant, for six Years Wages due to the Plaintiff for his Salary, being a Steward: There was a Verdict for the Plaintiff at the Assizes in Berkshire, and only seven Pounds Damages given.

Comb. 170,

171.

Carth. 86, 87.

Cro. Car. 575.

Earl of Oxon

ver. Water-

house.

1 Saund. 23,

38.

1 Sid. 84, 306.

2 Sid. 113.

2 H. 4. c. 7.

It was moved to discontinue the Action, and that the Postea might not be brought in; sed non allocatur; for after a general Verdict the Court will not suffer the Plaintiff to discontinue his Action: It hath been allowed after a Special Verdict, and an Argument at Bar; so likewise after a Joining in Demurrer, but not after arguing such Demurrer. But the Statute H. 4. doth ordain, That after Verdict a Plaintiff shall not be nonsuit; which was otherwise at Common Law; for if he did not like his Damages, he might be nonsuit.

S. C. 2 Salk.

472.

Rex *versus* Inhabitants of Haswell.

Vide post.

396, 416.

THE Statute made Anno 14 Car. 2. cap. 12. enacts, That upon the Complaint of the Church-wardens and Overseers of the Poor to any Justice of the Peace, within forty Days after any Person cometh to settle himself in a Tenement under the yearly Value of 10*l.* that two Justices of Peace (*Quorum unus*) of that Division where such Person is likely to be chargeable to the Parish, by Warrant may remove him to the Parish where he was last legally settled. Provided, If he think himself aggrieved by the Judgment of the two Justices, then he may appeal to the

next Quarter-Sessions, who are required to do Justice according to the Merits of the Case.

Two Justices, by Warrants under their Hands and Seals, removed a poor Man from the Parish of Woking to Haswell; thereupon an Appeal is brought, and the Sessions Order was, That the Warrant of the two Justices should be superseded, and that the Party should be carried back to Woking.

Which Order being removed by Certiorari, Exceptions were taken to it, 1. That the Justices in their Sessions had no Power to supersede the Warrant made by the two Justices, because they had only Power to quash or affirm it; and the Writ Superseas is properly applicable to Process before Judgment, and not to the Judgment itself: As if a Man be in Custody upon a Writ, and then comes a Superseas to the Writ, the Prisoner is thereby discharged.

The Court were of Opinion, that Superseas was not a proper Writ in this Case, but would not quash the Order, but referred the Matter to the Judge of Assize.

Stokes versus Oliver.

WRIT of Error was brought to reverse a Common Recovery, and a Sci' Fa' against the Certenants, who are summoned and appear, and the Sheriff hath returned, that there are no other Tenants. The Error assigned was, that the Toucher was a Feine Covert, and under Age, and appeared by Attorney. If he had touched in Person, or by Guardian, such a Recovery should not be reversed for Error after full Age; because a Guardian is made by the Court, who will not admit of any one, but such who shall be answerable for the Loss that the Infant may sustain; but an Attorney is made by the Party, and an Infant may not have Discretion enough to choose an Attorney who will be faithful to him.

Therefore he appearing by Attorney, and suffering a Recovery, it shall be reversed for the same after the Party comes of Age, because it shall be tried by the Country, Whether the Warrant of Attorney was made when under Age, or not?

Neither can the Husband, tho' of full Age, make an Attorney for himself and Wife, under Age, to bind the Inheritance of the Wife; but he being the Principal must be barred by her own Act; and therefore he must appear in Court in such Manner as the Law hath directed by Reason of her Infancy.

Ante 163.
Post. 395,
416.

Vide 2 Salk.
472, 475,
477, 481.
Ca. in Law
and Equ. 103.
Carth. 469.

Vide 1 Sid.
321, 322.
2 Saund. 94,
25.
Comb. 63,
101.
Carth. 122,
123, 124.
2 Keb. 878.
2 Lev. 38.
Fitzgib. 1.
Hob. 197.
Cro. Car. 307.
1 Roll. Abr.
731, 751,
752.
Bridgm. 73.
Holland ver.
Jackson.

1 Sid. 322.
Raby ver.
Robinson.

It may be a Question, Whether she can be barred by any Act of her own, besides a Fine; for she is not examined upon a Common Recovery?

3 Lev. 36.

But this is not like the Case of a Fine levied by an Infant, for that cannot be reversed but by the Infant himself during his Minority; for it being the Act of the Court to suffer such a one to levy a Fine, the Court must therefore reform the same by Inspection, which cannot be after full Age.

For this Reason, the Recovery was reversed Nisi Causa the End of this Term.

Haines Barley's Case.

Vide 6 Mod.
225, 248.
& post. 385,
386.

Ejectment for Lands in Essex tried at Bar, the Plaintiff claimed as heir at Law to one James Wade, who had Issue William Wade, and one Daughter, who was now the Lady Bash, and Lessor of the Plaintiff.

William Wade had likewise Issue, one Son and two Daughters, who were all dead without Issue.

The Defendant made a Title under a Conveyance by Lease and Release, dated the 21 Maii, 21 Car. 2. and made between William Wade of the one Part, and Haines Barley and John Turner of the other Part, by which the Lands in Question were settled upon them and their heirs to the Use of William Wade for Life; so to his first, second, and third Son in Tail-male, like Remainder to John William Haines and Charles Barley, Remainder to Haines Barley the Father, Remainder to the Right heirs of William Wade for ever.

Vide 6 Mod.
149, 225,
248.
Farell. 129.
1 Mod. 4, 94;
114.

The Plaintiff then produced a Deed made in the Year 1633, between the said James Wade of the one Part, and Charles Mordant and his Wife, and John Mordant, of the other Part; which Deed was attested by three Witnesses, two of which were proved to be dead, and the other could not be found: By which Deed it appeared, that a Fine levied, and the Uses thereof, were declared to James Wade for Life, Remainder to his first Son, and the heirs Males of his Body; so to his second, third, and all other the Sons of the said James Wade in Tail-male, Remainder to the Issue Females, then to the Wife of William Mordant for Life, Remainder to Charles Mordant and his heirs for ever: So that William Wade was Tenant in Tail, and could not bar the Remainder without a Recovery, which was then produced, and a Deed to lead the Uses thereof, and

Livery

Liberty and Seisin endorsed, to make a Tenant to the Pre-
cipe.

But it happened that one Frances Douglas had at that Time an
Estate for Life in these Lands as her Jointure, but the Jointure-
Deed could not be produced: But they proved, that in 1661,
she levied a Fine sur concessit, and did demise the same to one
Woolly for ninety-nine Years, if she lived so long, for securing
the Payment of 400 l. which Mortgage was afterwards assigned
to one Monteariz, and both of them joined in a Lease to William
Wade for sixty Years, if the said Frances lived so long, under
the yearly Rent of 200 l.

This was admitted to be a sufficient Proof of the Jointure. And to the like Purpose they produced Depositions in Chancery,
which they offered to be read, the Bill and Answer being taken
off the File, and lost, but they offered to give an Account that
it was once filed, which was by the Six Clerks Book; and pro-
duced an Incolment of the Decree, which mentioned both Bill
and Answer. And the Court being of Opinion, that the Join-
ture-Deed being lost, they might supply the Proof by Memorials
thereof, since it was impossible to shew the Deed itself.

So the Plaintiff had a Verdict for so much as was in Join-
ture.

Martin *versus* Monke.

IT was moved to amend a Fault in the Jurata after Verdict
found for the Plaintiff at the Assizes in Suffex; it was Jur-
between the Plaintiff and Defendant, de placito, &c. ponitur
respectu coram Dom' Reg' & Dom' Regina apud Westm', &c. nisi
Justiciar', &c. ad Assisas capien' assign' prius die, &c. vicesimo die
Martii. It should have been coram Domino Rege only; and the
Day of Nisi prius was mistaken, for the Assizes were the 23d
of March. The Record was right, by which he prayed it to be
amended; and for Authorities, the Case of Merchant and Reason
was cited, where the Record was de Placito debiti, upon the
Statute 2 Ed. 6. for not setting out Catches, and the Jurata in
the Record of Nisi prius was de Placito transgressionis. This
was amended after a Verdict for the Plaintiff, because it was
only a Misposition of the Clerk.

So where it was upon a *Nisi prius, that Challenge was
made to the Sheriff after Issue joined, and Venire Facias awarded
to the Coroner; but the Record was, that the Venire Facias was
awarded unto the Sheriff, which was not entered at the Time
of Case.

Vide 1 Salk.
278, 281,
286.
2 Salk. 555.
6 Mod. 225,
248.
& post. 386.
Ca. in Law
and Equ. 8.
2 Vern. 471,
591.
Skin. Rep.
584, 673.

Vide 1 Salk.
50, 51, 88.
Post. 399.
6 Mod. 268,
to 287.
6 Mod. 164,
264.
Cro. Car. 274,
Roll. Abr.
202.
Placito 7.
Skin. Rep. 591.
Comb. 4, 58,
86, 419.
Ca. in Law
and Equ. 88.
1 Salk. 47.

* 2 Cro. 354.
Palm. 378.
2 Cro. 669.
Idem Cro.
Car. 204.
Aquila Week's
Case.

of the Trial, but is usually made up afterwards in Time of Vacation; yet this being only a Mistake of the Clerk, shall be amended by the Record.

But on the other Side it was insisted, That this was not amendable, for the Justices of Nisi prius had no Authority to take such a Record.

8 Rep. 161. b.
Blackmore's
Case.

11 H. 6. 11.

The Mistake of a Clerk in a Writ of Nisi prius is amendable by the Statute of 8 H. 6. but then it must have sufficient Matter expressed or implied to give Authority to the Judge to try the Issue, for without that Writ he cannot try the Cause; and therefore in Debt against the Defendant Husbandman, the Question was, Whether he was so, *die imprecationis brevis*? And the Writ of Nisi prius, by which the Cause was tried, takes Notice that the Defendant was a Husbandman; but the material Part of the Issue was left out, *sc.* Whether he was so, *Die imprecationis brevis*, or not? there was a Verdict for the Plaintiff: and tho' the Record was right, the Court would not suffer the Writ of Nisi prius to be amended, because by that Writ the Judges had no Power to try the Issue in the Record.

1 Salk. 70, 88.
Post. 399.

In all the Cases where the Record of Nisi prius hath been amended by the Roll, the Writ of Distringas hath been right; which together with the Nisi prius is a sufficient Authority for the Judge to try the Cause; but here the Distringas was wrong, for it was *Gulielmus & Maria, Dei Gratia, &c.* which could not be; for the Queen died in December, and the Cause was tried the 23d of March following; for which Reason the Court held this not amendable.

Thwaites & Ux, &c.

Wile & Saind.
28a, 283.
2 Keb. 576.

AN Action of Debt was brought for Rent upon a Lease of a House to be made by three Judges, pursuant to the Act, for erecting a Court of Judicature for Determination of Differences concerning Houses built in London, whose Judgment and Decrees by the said Act are made a Record and entered in a Book, and kept by the Lord Mayor, with the Records of the City; in which Lease the Rent of 2 l. 13 s. was reserved per Annum, and the Plaintiff declared for 100 l. due for so many Years; and it appeared upon the Record in calling up the Sums that he had declared for 8 l. too much.

The

The Defendant pleaded Nil sci Record, and there was a Judgment for the Plaintiff, that he had produced the Record. It was moved in Arrest of Judgment, That this being in Debt for Rent, and an Issue Demand of a Sum certain, the Plaintiff could never have Judgment, because it appeared upon his own Showing, that he had not any Cause of Action for the Whole.

If it had been an Action of Covenant to pay a yearly Rent, and the Bond had been assigned for Non-payment of a certain Sum at such Days, and the Whole had not amounted to so much as demanded, that might be well enough; because in Covenant Damages are to be recovered according to the Evidence, and not as the Party hath summed it up. But my Lord Coke was of Opinion, That upon Debt for Rent it was otherwise, because in that Action you recover the Sum demanded.

Roll. Rep.
1st part, 335.
Ferrar ver.
Soelling,
Ibidem.
3 Bulst. 145.

In all Actions of Debt, the Plaintiff is obliged to the Sum in Demand, and therefore ought, at his Peril, to declare for the true Debt; and the Reason why he ought to demand the very Sum, is, because if he should do otherwise and recover, he might afterwards bring an Action for the true Sum, and so the Defendant would be doubly charged; and therefore in Debt upon a Bond, if the Plaintiff declare for less than due, he shall never have Judgment.

Roll. Rep.
2d part, Penn-
berton ver.
Shelton.

To which it was answered, That tho' the Action was for an entire Sum, yet it was made up of several Rents to be paid at divers Days, and so must be taken as several Demands for the Rent; as where Debt was brought upon three Bonds, and upon Oyer the Defendant pleaded Condition performed, and there was a Verdict for the Plaintiff. Now tho' the Plaintiff could not have Judgment as found by the Verdict, yet releasing Damages and Costs, he had Judgment for the two first Bonds.

Hob. 178.
Andrew ver.
Delahay.

So where the Defendant answered for 5l. Rent, and a Nomine poene for Non-payment at the Day, but laid no actual Demand of the Rent, the Answer was held naught as to the Nomine poene, because it could not be enforced without a Demand of the Rent; yet he had Judgment for the Return of the Cattle, because he had a lawful Cause to distrain for Rent Arrear, and the Demands were several.

Hob. 133.
Howell ver.
Sembach.

The like Judgment was given where a Plaintiff brought an Action of Debt for 40l. upon the Statute of Usury, and declared, that the Defendant corruptive did lend 40l. contra formam Statuti, and such a Day did also lend 20l. contra formam, &c. but

2 Cro. 104.
Wooly's Case.

did not say corruptive. Upon Non debet pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Declaration was not good for the last 20 l. because it wanted the Word corruptive: But the Court gave Judgment for what the Plaintiff had well declared; and nil capiat per Billam was entered as to the Residue. So it would have been if it had been upon Demurrer.

But there is a later Book which seems to warrant this Case, in which the Case of Dupper and Baskervill is reported, which was an Action of Debt for Arrear of Rent, in which the Plaintiff declared for more Rent, and for a longer Time than upon his own Shewing appeared to be due to him; which the Defendant perceiving, pleaded Nil detinet, but concluded his Plea with hoc paratus est verificare, and not to the Country as he ought to do, on Purpose that the Plaintiff might demur: Which was done accordingly, and had Judgment against the Defendant for the ill Conclusion of his Plea.

Ca. in Law
and Equ. 69,
70.

But the Plaintiff afterwards finding his Mistake, he entered a Remittitur for so much in the Declaration more than was due to him, and took his Judgment for the rest; and thereupon the Defendant brought a Writ of Error in the Exchequer-Chamber, and this very Exception was taken to the Declaration, and all the Cases before-mentioned were cited, to prove that the Plaintiff might release the Surplusage before Judgment, which if he had neglected, the Court ought to give Judgment for so much as was well demanded in the Declaration. And this seems agreeable to the fourth Rule in Godfrey's Case, That if a Man brings an Action for several Things, and upon his own Shewing it appears that he cannot have an Action for one Thing, the Writ shall not abate for the Whole, but he shall recover for what the Action will lie, and be barred for the rest.

1 Samd. 285.
Pal. 524.
Yelv. 71.
11 Rep. 45.

Roll. Abr.
1st part, 785.
Style 175.

And lastly, for a Case in Point, that of Barber and Pomeroy was cited, which was Debt for Rent as this is; and the Plaintiff had declared for more than was due upon his Shewing, and upon Nil debet pleaded the Plaintiff had Judgment, and Damages and Costs; and it was moved in Arrest of Judgment, for the Plaintiff had made an entire Demand for Rent to a certain Sum; when it appeared that he could not have an Action for so much, yet the Court held that he might release the Surplus, and Damages, and take Judgment for the Residue.

It

It is true, my Lord Hale said, That Judgment was never given in this Case; but my Lord Rolle cites the Number-Roll, and the Term when it was entered.

If this had been pleaded in Abatement, the Action had been discharged; but the Court ex Officio are not bound to abate it, especially since the Defendant had waived that Matter, and pleaded Nil-tiel Record, and insisted upon the Right.

And the Court was of Opinion, That if an Action of Debt be brought upon several Bonds, and it appears that one is not due, the Plaintiff may recover the rest. So here the Plaintiff demanded 100 l. upon several Arrears of Rent, and it appeareth that the whole is not due, but falleth short 10 l. he may recover for the Residue.

1 Saund. 284,
285.
1 Sid. 417.
Comb. 365.

DE

D E

Term. Sanctæ Trin.

Anno 8 W. 3. in 1696.

Dorset ff. **D**ominus Rex mandavit. Vic. Com. præd. Breve suum clausum in hæc verba, sc. Will'mus Tertius Dei Gra. Angl. Scot. Franc. & Hibern. Rex, Fidei Defensor, &c. Vic. Dorf. salutem. Præcipimus tibi sicut alias tibi præcepimus quod capias Bonham Strangewaies Ar. & Johannem Doe si invent. fuerint in Balliva tua & eos salvo Custod. ita quod Habeas Corpora eorum coram nobis apud Westm. die Mercurii prox. post Tres Sep. Sanctæ Trinit. ad respond. Roberto Forest & Susanne ux. ejus de Placito transgr. ac etiam Bil. ipsius Roberti & Susanne versus ipsum Bonham pro Cent. libr. secundum cons. Cur. nostr. coram nob. existen. & habeas ibi tunc hoc Breve teste Johan. Holt Mil. apud Westm. 6^o die Maii, Anno Regni Regis vii. Holt & Colman.

Executio istius Brevis patet in quadam Scheda huic Brevi Annex. Will'mus Bennet Ar. Vic.

Virtute istius Brevis mihi direct. & huic Schedulæ annex.

quoddam Warrant. meum sub manu mea & Sigillo Officii mei Vic. Com. mei infra script. feci & direxi Thomæ Mereft al. Merice, Johanni Hinton & Edwardo Grimsted Ballivis meis in hac parte ad arrestan. & capien. Bonham Strangewaies Ar. in dicti. Brevi nominat. secund. exigen. ejusd. Brevis qui quidem Tho. Mereft al. Merice, & Johannes Hinton Ballivi mei virtute Warrant. mei præd. Decimo die Maii, Anno reg. Dom. nostri Will'i Tertii infra script. septimo apud Portland in Com. meo Dorset ceper. & arrestaver. præd. Bonham Strangewaies & ipsum in custod. sua ad tunc & ibidem habuer. & detin. & sic in custod. sua ad tunc & ibid. existen. postea scil't eisdem die & Anno quidam Thomas Gilbert de Portland præd. Yeoman, Will'mus Elliot de ead. Yeoman, Johannes Oyles de eadem Yeoman, Robertus Oyles de ead. Yeoman, Chr'us Witt de eadem Yeoman, Edwardus Glover de eadem Yeoman, Johannes Farr de eadem Yeoman, Johan. White de eadem Yeoman, & Johannes Peters de eadem Yeoman, ad tunc &

& ibidem Vi & Armis, &c. viz. Bonham Strangewaies ad largi-
 bacula, gladiis, sclopis [Anglice um iro posuer. & permiser. ac t-
 pottate] & cultellis, adtunc & dem Bonham Strangewaies seip-
 ibid. rixose, rixose, & illicite in sum extra Custod. Ballivorum
 ipsos Tho. Merest al's Merrice, contra volunt. eorum Ballivorum
 Ballivos meos insult. fecer. & ip- adtunc & ibidem qualiter rescu-
 sos verberaver. vulneraver. & ferunt & rescussit contra pacem
 maletnachaver, ita quod de vitis dicti Domini Regis nunc Coron.
 eorum desperabatur & prafat. & Dignitat. suas, &c. Et postea
 Bonham Strangewaies a dictis idem Bonham Strangewaies an-
 Ballivis extra Custod. suas contra te retorn. brevis pced. non est
 voluntates eorundem Ballivorum invent. in Balliva mea
 adtunc & ibidem Vi & Armis, &c. cepit. & rescussit. & ipsam

W. Bennet, Ar. Vic.

Bonham Strangewaies Case on a Rescue.

THE Sheriff of Dorsetshire returned, That by Virtue of a Writ to him directed, he made a Warrant to three Bailiffs to arrest Bonham Strangewaies, Esq; which said Bailiffs did take him, and had him in their Custody; and one Gilbert and others, Vi & Armis in Thomam Merrice Ballivos meos insultum fecerunt, &c. & idem the Defendant, adtunc & ibidem a Custodia Ballivorum meorum & contra voluntates suas, did rescue.

Exception was taken to this Return, for that the Rescue was alledged to be ex Custodia Ballivorum; whereas it should have been ex Custodia Vicecomitis, because the Sheriff and not the Bailiff is the Officer of this Court, and the Process is directed to him.

Anno 39 H. 6. A Writ was directed to the Coroners of Surrey to arrest a Man, and one of them made a Return in his own Name alone, that he had made a Warrant to his Servant to arrest the Defendant named in the Writ, who took him, and afterwards he was rescued from his said Servant, when it should have been from himself; for the Arrest by the Servant, is the Arrest made by the Master, and by Consequence the Rescue must be from him.

And ever since that Case, this hath always been allowed to be a good Exception to a Return of Rescue, where the Party is indicted for it, and rescued out of the Custody of the Sheriff's Bailiff: But it may be otherwise, if he had been rescued from a Bailiff of a particular Liberty, because he is an Officer known in Law.

Rescous.
 Vide 6 Mod.
 141, 173.
 210, 211.
 &c. ibid.
 3 Mod. 114,
 115.

39 H. 6. 42. a.
 Brooke Abr.
 Tir. Rescous,
 Placito 15.

* Cro. Car.
 212.
 Roll. Rep.
 2d part 78.
 Het. 145.
 Lit. Rep. 236.
 Idem. March.
 92.
 Style 417.
 Sid. 332.

Anno 19 Car. 2. The like Exception was taken to a Return of a Rescous. Justice Twisden affirmed in this Court, that it had been ruled both Ways: But the Chief Justice Kelynge was of another Opinion, and that it had been usually quashed for this Reason.

Mod. Ca. in
Law and Equ.
1st part, 357.

It is true, if an Action on the Case be brought against the Party for a Rescous, there the Plaintiff may declare secundum Veritatem Facti, That the Defendant rescued the Prisoner out of the Custody of the Sheriff's Bailiff or Deputy: But if he be indicted for it, then it must be secundum Veritatem in Lege; i. e. That the Prisoner was rescued out of the Custody of the Sheriff himself.

And because it was returned, That the Party was in Custody of three of the Bailiffs, and the Defendants insultum fecerunt upon one, which the Sheriff called Ballivos meos; for that Reason it was quashed.

Rex & Regina versus Thorp, & al. Hill. 6 Will. & Mariæ, Regis & Reginæ.

South'ron ff. **M**emorandum Gen^l, al's dict. Elizabetha Streper nuper de Reading præd. in quod Edw. Com. præd. Vid^l, al's dict. Elizabetha Streper nuper de eisdem Ward Mil. Attorn. Domini Regis & Dom. Reginæ nunc general. Spinster, & Franciscus Harguile qui pro eisdem Domino Rege & Domina Regina in hac parte nuper de Reading in Com. Berks Yeoman, existentes & quilibet sequitur in propria Persona ven. eorum existens Person. malor. nominis famæ & conversation. inhic in Cur. dictor. Domini Regis & Dom. Reginæ coram ipsis honest. ac debit. & justissimas Lege & Regina apud Westm. ges hujus Regni Angl. parvi penden. decimo Die Octobris, Anno Die Martis prox. post Octab. Regni Domini Willielmi & Domini Sancti Hill. isto eodem Term. & minæ Mariæ Dei Gratia Angliæ, & pro eisdem Domino Rege & Domina Regina dat Cur. hic intelligi & informari quod Henricus Scotiæ, Franciæ & Hiberniæ Regis Thorp nuper de Reading in Com. Berks, Gen^l, Ursula Holton & Reginæ Fidei Defensor, &c. nuper de London Vid^l, Thomas quinto, & diversis al' diebus & Deer nuper de Winton in Com. vicibus tam antea quam postea apud Winton. in Com. South'ton nequit. deceptive & illicite conspiraver. machinaver. & intendebant quendam Edwardum Mitchell Gen. infra ætatem octo-

decim

decim Annorum existen. Filium unicum & Hæred. cuiusdam *Roberti Mitchell de Petersfield in Com. South'ton Ar. extra Custod. Consil. & Gubernation. præd. Roberti Mitchell sine notitia & contra voluntatem præd. Roberti Mitchell capere & seducere & cuidam Cornelia Holton Person. malor. nominis famæ & conversation. inhonestæ necnon nullius Fortunæ sive substantiæ eidem Edwardo Mitchell in Matrimonio conjungere & ad eandem conspiration. machination. & diabolicas intention. suas præd. perficiend. & perimplend. præd. Henricus Thorp, Ursula Holton, Thomas Deer, Anna Deer, Elizabetha Streper, & Franciscus Harguile postea scil't præd. decimo Die Octobr. Anno Regni dictor. Domini Regis & Dominae Reginae nunc quinto supradicto, apud Winton. præd. in Com. South'ton præd. nequit. injuste & illicite sese assembler. & congregaver. quodque iidem Henricus Thorp, &c. postea scil't eisdem Die & Anno supradicto, apud Winton. præd. in Com. South'ton præd. secund. conspiration. præd. sic ut præfertur inter eos habit. falsæ, malitiöse, injuste & deceptivæ per divers. falsas, malitiosas, & deceptivas insinuation. & vias decipiebant [Anglice *disinveigle*] & persuadebant & quilibet eorum præd. Henricus Thorp, &c. adtunc & ibidem decipiebat & persuadebat præd. Edwardum Mitchell ad præd. Robertum Mitchell patrem suum benevolum & amicissim. in odio & contempt. habere necnon Scholam apud Winton. in Com. South'ton præd. ubi per patrem suum præd. pro education. & instruction. ipsius Edwardi Mitchell in bonis literatur. bonisque moribus præd. antea locatus fuit relinquere & abdicare ac etiam domum ipsius Henrici Thorp apud Winton. in Com. South'ton præd. existen frequentare iidemque Henricus Thorp, &c. per diversas iniquas & falsas sollicitation. adtunc & ibidem persuadebant & illicite compellebant & quilibet eorum præd. Henricus Thorp, &c. persuadebat & compellebat præd. Edw. Mitchell ad diversas aquas ac liquores valde fortes bibere inebriari ac præd. Edw. Mitchell adtunc & ibidem fore ebrium fecer. & procuraver. & quilibet eorum fecit & procuravit necnon præd. Corneliæ Holton adtunc & ibidem & præd. al. diebus & vicibus postea in consortio præd. Edwardi Mitchell deceptivæ & astute introduxer. & procuraver. & per diversas blandulas falsas & deceptivas locutiones & verba illicite & deceptivæ adtunc & ibidem persuadebant & sollicitabant præd. Edwardum Mitchell eidem Cornelia Holton in Matrimonio conjungi. Et ulterius idem Attorn. dictor. Domini Regis & Dom. Reginae nunc general. pro eisdem Dom. Rege & Dom. Regina dat

* Doth not say that Mr. Mitchell was a Man of an Estate.

Cur. hic intelligi & informari quod idem Henricus Thorp, &c. in ulteriori prosecutione machinatione & intentione suarum præd. postea scilicet decimo sexto Die Octobr. Anno Regni dictor. Dom. Regis & Dom. Regine nunc quinto supradicto apud Winton. præd. in Com. South-ton præd. illicite falso & nequissime & per diversas falsas asseverationes & promissiones sollicitaver. incitaver. & procuraver. & quilibet eorum sollicitavit incitavit & procuravit eundem Edwardum Mitchell ad Scholam præd. & frequentationem inde relinquendam & abstinendam & abinde decedendam contra voluntatem & sine notitia vel consensu præd. Roberti Mitchell patris sui necnon eundem Edwardum Mitchell sine notitia & contra voluntatem præd. Roberti Mitchell adtunc & ibidem receper. manutener. & custodiver. ea intentione ad decipiendum & persuadendum eundem Edw. Mitchell in Matrimonio cum præd. Cornelia Holton conjungi & quod præd. Cornelia Holton postea scilicet vicesimo Die Octobr. Anno Regni dictor. Domini Regis & Dom. Regine nunc quinto supradicti apud Watlington in Com. Oxon. ex abettamento & præd. falsis mediis præd. Henric. Thorp, &c. contraxit Matrimonium cum præd. Edwardo Mitchell ad grave dampnum præd. Roberti Mitchell

miserrimam disconsolationem & tristitiam præd. Roberti Mitchell præd. patris præd. Edw. Mitchell ac omnium amicorum suorum in contemptu leg. hujus Regni Angliæ manifest. in malum exemplum omnium aliorum in tali Casu delinquent. ac contra pacem dictor. Domini Regis & Dom. Regine nunc Coron. & Dignitat. suas, &c. unde idem Attorn. dictor. Domini Regis & Dom. Regine nunc general. pro eisdem Domino Rege & Domina Regina pet. advisamentum Cur. hic in præmissis & debet legis processum versus præfat. Henricum Thorp, &c. in hac parte fieri ad respondendum dictis Domino Rege & Dom. Regine de & in præmissis, &c.

Jur. dicunt quod defend. Ursula Holton, Thomas Deer, Anna Deer Ux. præd. Thome, Elizabetha Streper Ux. Willielmi Streper, & Franciscus Harguile, non sunt culpabiles quodque defend. Thorp. quoad omnia in informatione content. præter compulsionem Edwardi Mitchell in informatione præd. mentionat. ad aquas fortes & liquor. in informat. præd. bibend. est culpabil. & quoad compulsionem præd. Edwardi Mitchell ad aquas & liquores præd. bibend. Jur. præd. dicunt quod defend. Thorp. non est culpabil.

Rex & Regina *versus* Thorp, & al.

Information against Thorp and others, setting forth, That they and each of them, being Persons of ill Fame, did on the 10th of October, 5 Will. and at divers other Times as well before as after, wickedly, unlawfully, and deceitfully conspire at Winchester to take one Edward Mitchell, being under Age of eighteen Years, and the only Son and Heir of Robert Mitchell, Esq; and to carry him out of the Custody, Counsel, and Government of his said Father, without his Notice, and against his Will, and to marry him to Cornelia Holton, a Person of ill Name, and of no Fortune.

That the Defendants did unlawfully assemble themselves together, to accomplish the said Conspiracy and wicked Intentions.

That they, and every one of them, by divers false, malicious, and deceitful Intimations, did falsely, unjustly, maliciously, and deceitfully persuade the said Edward Mitchell to hate his Father, and to leave Winchester-School, where he was placed by his Father for his Learning, and to frequent the House of the Defendant Thorp at Winton, and did persuade the said Edward Mitchell, and by divers false Allurements did compell him to be drunk with Strong Waters, and other Liquors; and that they introduced Cornelia Holton into his Company, and did unlawfully and deceitfully, by false Speeches, persuade and sollicit him to be married to her.

That in further Prosecution of their Intentions, the Defendants, and every of them, 16 October, 5 Will. did by divers false Assurances and Promises, sollicit, invite, and procure the said Edward Mitchell to leave the said School, against the Will, and without the Notice or Consent of his Father, and did receive, maintain, and keep him, with an Intent to persuade him to marry the said Cornelia Holton.

That the said Cornelia Holton did contract Marriage with the said Edward Mitchell on the 20th Day of October, 5 Will. at Watlington in the County of Oxon, by the Abetting and false Means of the said Defendants, to the Damage of the said Father, &c.

Upon Not guilty pleaded, this Information was tried at the Assizes at Winchester, and all the Defendants were found Not guilty, except Thorp; and he was acquitted of compelling the

Vide 1 Salk.
14, 15, 21.
2 Salk. 456,
1 Mod. 4.
2 Mod. 306.
1 Lev. 275.
1 Lutw. 122.
1 Venr. 12,
18, 25.
1 Sid. 424.
6 Mod. 261,
&c.
Comh. 456,
457.
Carth. 384,
385.

said Mitchell to be drunk, and found guilty of all the rest in the Information.

It was moved in Arrest of Judgment; and the Exceptions taken were,

1. This Information doth not contain any Matter of Misdemeanor.

2. It is laid by way of Conspiracy, and the Defendant Thorp being only found guilty, there can be no Judgment against him, because one cannot conspire.

3. There is a Mistake; for the Conspiracy being laid in Hampshire, and the Marriage being in Oxfordshire, it ought not to be tried by a Jury of Hampshire alone, but by a Jury of both Counties.

1. There is no Misdemeanor laid in this Information; for by the Laws of England, a young Man of the Age of fourteen Years and upwards may dispose of himself in Marriage; and it is no Offence to persuade him to marry, tho' it be to a Woman of mean Fortune, and without the Consent of the Father: For he cannot have an Action for the Loss of the Marriage of his eldest Son and Heir, except where he is taken by Force and married.

For an Action will not lie for any Solicitation, because People may differ in Opinion; one Man may think it a convenient Match, and another may be of a contrary Opinion: Therefore the Plaintiff ought to shew, that the Defendant did solicit or procure his Son to be married by some unlawful Means. The Information is too general, he should have shewed a particular Offence; besides, it doth not appear that either the young Man or his Father had any Estate Real or Personal: It is said, he was Son and Heir of Robert Mitchell, but non constat that he had any Estate.

2. The Intent of this Information was to make these Defendants guilty of Conspiracy. Every Act which is laid to be done by them, is in order to accomplish a joint Intention; for it is said, That all the Defendants did wickedly, &c. conspire, endeavour, and intend to get the Son out of the Government of his Father, and marry him, &c. which is a joint Act. If it

Cro. Eliz. 55.
1 Leon. Placito 63.
Idem Jones 411.
Placito 4.
Style 216.

had not been laid by way of Conspiracy, it should have been quilibet eorum, did endeavour and intend, &c.

So that all being acquitted but Thorp, the Verdict hath falsify'd the Information; for one cannot conspire.

3. This Information consists of two Parts, the perswading the young Man to marry the Woman, which is laid to be in Hampshire; and the Execution of their Design, which is Marriage itself, and that is laid to be in Oxfordshire; which being two Facts in different Counties, ought not to be tried by a Jury of one County alone, but both ought to join.

If a Man forge a Deed in one County, and publish it in another, the Trial shall be by a Jury of both Counties; for the Writing, as well as the Publication of that Writing, is material.

So in Replevin, the Defendant said, That the Locus in quo, &c. contained four Acres in Coningham, which was his Freehold, and so justifies the taking Damage-tenant.

The Plaintiff, in Bar to the Abowry, pleaded, That the Locus in quo, &c. was Parcel of a greater Common Field in Coningham, and that he prædicto Tempore, &c. was seized in Fee of a Messuage, and fourteen Acres of Meadow and Pasture thereunto belonging, and prescribes to have Common for his Farmers and Tenants of the said Messuage for his Cattle Levant and Couchant tanquam ad tenementum prædicti spectant. Upon this an Issue was taken, and a Verdict for the Plaintiff; but the Judgment was stayed, because it is not set forth in the Bar where the Messuage and Land was to which the Common did belong, which ought to be, because the Ve' Fa' must be where the House and Land were, and not where the Common was, for that may be either appurtenant or appendant to Land in another County.

Econtra.

As to the first Objection it was answered, That there is a plain Offence set forth in this Information; and this appears upon the very reading of it.

Then it is not only an Information grounded upon a Conspiracy, but it is laid by way of Aggravation in the Beginning; and when the particular Facts are set forth, there it is alledged, that quilibet eorum did wickedly perswade, &c.

In Easter Term, 20 Car. 2. an Action was brought in this Court grounded upon a Tort, wherein the Plaintiff declared against the Defendant, That per Conspirationem inter eos habitam, and to oppress and impoverish the Plaintiff, they caused a Plaintiff

1 Lev. 62,

124, 125.

1 Sid. 405.

Comb. 75.

115.

1 Salk. 174.

1 Salk. 669.

1 Sid. 217.

2 Lev. 121.

122.

Roll. Abr.

2d part, 607.

4 H. 6. 4. b.

Yelv. 177.

Brookline

ver. Thorold.

1 Salk. 174.

1 Salk. 669.

1 Sid. 217.

2 Lev. 121.

122.

Roll. Abr.

2d part, 607.

4 H. 6. 4. b.

Yelv. 177.

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1 Salk. 174.

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2 Lev. 121.

122.

Roll. Abr.

2d part, 607.

4 H. 6. 4. b.

Yelv. 177.

Brookline

ver. Thorold.

Nota, Morton was of another Opinion, and Saunders himself was of Opinion, That the Plaintiff should not have Judgment, because by these Words, *per Conspirationem*, it seemed to be a form'd Action of Conspiracy, and the Declaration was falsify'd by the Verdict, one of the Defendants being only found guilty. Vide 1 Saund. 228, 229. Raym. 33.

Plaint to be levied against him in the Sheriff's Court of London, and the Plaintiffs to be arrested, &c. and upon Not guilty pleaded, they were all acquitted but one, as in this Case, and the like Exception was then taken in Arrest of Judgment: But the Court were of Opinion, That notwithstanding these Words *per Conspirationem*, &c. it was an Action on the Case, the Substance whereof was the illegal arresting the Plaintiff, and not the Conspiracy, and that being found by the Jury, the Plaintiff had his Judgment.

That which is lawful for one Man to do, may be made unlawful to be done by Conspiracies; for Instance, it is lawful for any Brewer to brew Small Beer, but if several shall conspire together to brew no Strong but all Small Beer, on Purpose to defraud the King of his Duties, such Conspiracy is unlawful. And so it was held in Sir Samuel Sterling's Case, who, because he could not Farm the Excise, did confederate with several Brewers to brew Small Beer only.

3. It is true, if a Deed be forged in one County and published in another, these are several and distinct Offences, and therefore shall be tried by different Juries.

So in the Case of a Common in one County, by Reason of Lands in another; if an Action of Trespass be brought for feeding in the Common, and the Defendant justifies by Reason of a Prescription as belonging to Lands in another County; there, if Issues be taken upon the Prescription, it must be tried in the County where the Land lies, and not where the Common is.

But in an Indictment the Counties are never joined.

Curia.

It is a Misfortune that the Marriage is good; it is true, it is lawful to marry, but if it is obtained by unlawful Means, it is an Offence.

Carth. 386.

The Question is, Whether a Father hath not the Guardianship of his Son and heir apparent till the Age of twenty-one Years, as he had when there was Tenure in Knight's Service? For the Father had such an original Right invested in him by Nature, that he might have an Action of Trespass against the Lord, *Quare filium & heredem suum rapuit*. Adjourn.

Newnham

Newnham versus Lunn.

AN Action of Debt was brought by a Common Informer upon the Statute 23 H. 6. against the Defendant, for taking 5s. 6d. for an Arrest on a Bond. That Statute enacts, That the Sheriff shall have 20d. and the Bailiff who makes the Arrest 4d. and that the Sheriff or Bailiff who doth contrary, shall pay treble Damages to the Party grieved, and forfeit the Sum of 40l. one Moiety to the King, and the other to the Party that will sue; and that the Justices of Assize in their Sessions, Justices of the one Bench and of the other, and Justices of Peace in their County, may determine the said Offences.

There was a Verdict for the Plaintiff, and it was moved in Arrest of Judgment, for that by the Statute of King James I. all Offences committed against any Penal Statute, for which any Common Informer may have a Popular Action, Bill, Plaint, Suit or Information, shall be prosecuted in the Counties where the Offence was committed, and not elsewhere. So it was adjudged in this Court in Easter-Term, 27 Car. 2. between Nicholes and Cockerill; for if Debt will lie here by a Common Informer upon a Penal Law, then the Statute of King James I. will be wholly abated.

The Action was brought in London, and the Offence was committed in Buckinghamshire. Adjournatur.

Jones versus Bodinham.

IN Trespass for taking Cattle, the Defendant pleads, That in Hillary-Term, Anno 6 Will. & Mariae, a Writ issued out of this Court, reciting that such a one was outlawed; whereupon the Sheriff was commanded to levy the Goods into the King's Hands, &c. That this Writ was delivered to the Sheriff, who made a Warrant directed to an Officer to levy the Goods, &c. who, by Virtue of that Warrant, took the Cattle upon Part of the Lands contained in the Outlawry.

The Plaintiff replies, That he did not take the Goods upon those Lands; upon which Issue was joined, and there was a Verdict for the Plaintiff.

And now it was moved in Arrest of Judgment, That the Justification of the Defendant consists in three Parts, a Writ,

M m m

and

23 H. 6. cap.
10.
Comb. 37b.21 Jac. c. 4.
Vide post.
425.
1 Salk. 373.S. C. 1 Salk.
1 & 173.
Post. 310.
Comb. 379,
380. S. C.
Carth. 399,
390.

and Warrant, and Taking the Cattle upon the Land. Now there could be no such Writ, for there was no such Term as 6 Will. & Ma. for the Queen died before. So that the Question was, Whether this ill Pleading of the Writ had made the whole Plea void? If so, then it was said, That Issue being taken upon a void Plea, which contained no Matter of Bar, the Verdict therein was void also.

3 Cro. 227,
228.
Moor 867.
Hob. 326.
Raym. 458.
3 Cro. 214.
1 Sid. 218.
Ca. in Law
and Equ. 300,
301, 230.
32 H. 8. c. 30.
Mod. Ca. in
Law and Equ.
1st part, 356,
357.

It was said for the Plaintiff, That Issue was not taken upon the bad Part of the Plea, but upon the Taking of the Cattle upon the Land. Now the Defendant had admitted the Taking, but avoided it, by saying it was in such a Place, which Prima facie is a good Defence and Justification; and though the Issue be joined upon a Thing not material, yet after Verdict it is aided by the Statute of Jeofails, which helps Mispleading, insufficient Pleading, and Misjoining of Issue after an Issue tried.

But on the other Side it was said, That this Plea contain'd no Matter of Bar, because there could be no such Writ under which he justified; and if there is no Bar, there can be no Issue, and so not avoided by the Statute.

If the Defendant pleads a proper Plea, though it is not full, it is aided by the Statute; and therefore in all Cases where Issue is taken upon an insufficient Plea in Bar, and which would have been ill upon Demurrer, it is held, that after a Verdict the Defendant should not take Advantage thereof; but here is no Plea at all, for it is merely void.

Bartholomew
versus Digh-
ton, Cro. El.
778.
1 Cro. 25.
1 Roll. Abr.
225.
Moore 696.

Therefore in Trespass, where the Defendant pleaded a Concord in Bar, but not with Satisfaction, Issue being taken upon the Concord, the Plea was ill for Want of Satisfaction being pleaded; yet it was not wholly void, because Concord was a good Plea to such an Action, though not so fully pleaded as it might.

Cro. El. 455,
367.
Moor 692.

So in Debt upon a single Bill, Payment without an Acquittance is an ill Plea; yet it is a proper Plea to such an Action, and the Issue being found for the Plaintiff, he shall have Judgment.

Hob. 326.
Reynolds ver.
Buckle.
2 Roll. Abr.
709.

So in Debt for Rent upon a Lease for Years, Entry is a proper Plea, but not good, without saying he did expel and hold him out; yet if Issue be taken upon Non intravit, and found for the Defendant, he shall have Judgment.

But here is no Matter of Bar in this Plea, and therefore an Issue joined upon it is void.

To this Purpose there was a Case in this Court, Anno 33 Eliz. It was Trespass for taking his Cattle. The Defendant justified for an Amercement in Court-Lest, for which he prescribed to distrain the Cattle of any which came within the Manor, and were in the Possession of any amerced; and saith, That they were in the Possession of such a Person, who was amerced, &c. Issue was taken that they were not in his Possession, and there was a Verdict for the Plaintiff, and a Writ of Error brought, and the Error assigned, that the Issue was joined upon a Thing merely void, for the Prescription being void, there is no Matter of Bar to the Action; and the Judgment was traversed.

Lovelace ver.
Grimston.
Cro. Eliz. 227.

The Plaintiff cannot have Judgment upon this Verdict for the Damages found, because Issue is joined upon a void Plea; and therefore the Court may award a Judgment against him, as by Nil dicit, and so the Plaintiff may have a new Writ of Enquiry of Damages.

Lacy ver.
Reynolds.
Cro. Eliz. 214.
Idem Roll.
Abr. 2d part,
99.
Knight ver.
Harvey.
Cro. Car. 25.
Ca. in Law
and Equ. 15.

There was a Case in Michaelmas Term, 1 Car. in this Court, which was Debt upon a Bond against an Administrator, dated the 20th of May, 20 Jac. The Action was commenced in Hilary Term, in the last Year of King James, and entered in Easter Term, 1 Car. and then the Defendant pleaded a Judgment upon another Bond, dated Anno quarto Regis nunc, which was impossible, it being the first Year of the King, ultra quod, &c. The Plaintiff replies, That Recovery was by Fraud; and Issue thereupon, which was found for the Plaintiff. The Defendant moved in Arrest of Judgment, for that it was impossible in the first of the King that a Recovery should be in the fifth Year, and therefore no Judgment could be given upon this Issue; yet the Plaintiff had Judgment.

But this is no Authority against this Case, because that was Debt against an Administrator who had pleaded a false Plea, which was found against him, and had not confessed Assets, but only to satisfy that Judgment.

Curia. When Issue is joined upon an ill Plea, and a Verdict for the Plaintiff, yet he shall have Judgment; for the Defendant shall not take Advantage after a Verdict of his ill Pleading.

2 Cro. Johns
ver. Riller.

As in Ejectment the Defendant pleaded, That one Ridler was seized in Fee, and made a Lease to him for five Years, by Virtue whereof he was possessed, until the Lessor of the Plaintiff entered and disseised him, and made a Lease to the Plaintiff; that thereupon he re-entered and ejected him, prout ei bene licuit. The Plaintiff replies, That his Lessor was seized in Fee, and leased to

to him, and the Defendant asked him, *abique hoc* that he did
 dismiss the Defendant, upon which the Plaintiff was found
 for the Plaintiff. Now this was a very false Issue, for it is im-
 possible that a Verdict for years should be dismissed; but the De-
 fendant shall not take Advantage of such an ill Plea, but having
 confessed a Lease made to the Plaintiff, and it being that he did
 not dismiss the Defendant, the Judgment is well given.
 For it stands with the Law, that the Plaintiff did not dismiss
 him. But if there had been a Verdict for the Defendant, he could
 not have Judgment, for then the Jury would have found, against
 the Law, That a Verdict was dismissed.

Hartop *versus* Thorp

GUilielmus Tertius, Del Gra-
 tia, &c. Johanni Holt Mi-
 liti, Capital. Justic. sub ad Placita
 coram nobis tenend', Salutem.

Cum in Statut. Parliament.
 Domini Elizabethæ, super Re-
 gine Angliæ, apud Westmo-
 nasterium vicesimo tertio Die
 Novembris, Anno Regni sui vi-
 cesimo septimo tenet', edit. inter
 alia inachiat: fuit Authoritate
 ejusdem Parliamenti, quod ubi
 Judicium ad aliquod Tempus
 postea reddit. sit in Curia Banci
 Regis in aliqua Secta vel Action.
 debet. Detention. Convention.
 comput. Action. super Casum
 Ejectione Firmæ vel Transgress.
 primo incept. vel incipiend. ibi-
 dem præter tal. tantum ubi dicta
 Regia erit Pars querens vel de-
 fendens versus quem aliquod tale
 Judicium reddit. erit ad Election.
 suam prosequit. sit extra Curiam
 Cancellar. special. Breve de Error.
 to be reversed in dicta Cur. Can-
 cellar. direct. Capital. Justic.
 præd. Cur. Banc. Regis, pro Tem-

pore existen. præcipiend. ill. cau-
 sare dict. Record', & omnia tan-
 gen. dict. Judicium, to be brought
 coram Justic. de Communi Ban-
 co & Baronibus Scaccarii in Ca-
 meram Scaccarii ibidem exami-
 nand. per dict. Justic. Com. Banc',
 & præd. Baron. in dict. Justic.
 Communis Banci & tal. Barones
 Scaccarii qui sint de Gradu of
 the Colfe, vel sex eorundem ad
 minus, Virtute illius Statuti ha-
 bebunt inde plenam Potestatem
 & Auctoritatem ad examinand.
 omnes tales Errores quales affig-
 nat. vel invent. erint in vel super
 aliquod tale Judicium, & insu-
 per reversare vel affirmare dict.
 Judicium prout Lex requirer,
 præter Errores assignand. vel in-
 ventend. pro vel concerni. Juris-
 diction. dict. Cur. Banci Regis,
 vel pro Defectu Formæ in aliquo
 Brevi, Return', Querela, Billa, De-
 claration. vel al. Placit. vel Pro-
 cess. Verdict. vel Proceden. qua-
 licumq; Et quod postea dict. Ju-
 dicium affirmat. vel reversat. erit
 dict. Record. & omnia eadem

tangen. remouetur autem huiusmodi
habe in dict. Cur. Banci Regis
quod est. Quodammodo etiam
superinde tam bene pro Execu-
tion. quam aliter potest specta-
bit, prout in dicto Statuto inter
alia plenius apparet, ac quia in
Recordo de iudicio, ac etiam in
Reuolition. Indictit Loquens, quod
fuit in Curia nostra coram nobis
per Billam inter Thomam Hartop
& Ricardum Holt, alias dict. Ri-
cardum Holt de London. Mercator,
tam de Debito Cent. triginta & quinque Lib., quod
eidem Thomae prefat. Ricardus
exigebat, quam de Quadragesima
& tres Solid. pro Damnis suis
que sustinuit Occasione Deten-
tion. Debiti illius, necnon in
Adjudicatione Executionis iudic-
pud super Breue nostrum de
Sci. fa. eadem Cur. nostra eman-
nem. ad prefat. Thomam versus
prefat. Ricardum de Debito &
Damnis ipsius Ricardi, sicut ex
Querela sua accepimus, qui qui-
dem Error nullo modo tangit nos
aut Jurisdiction. prefat. Cur. nostrae
de Banco Regis prefat., vel ali-

quem Defectum Formae in aliquo
Breui, Return, Querela, Billis,
Declaration, aut alio Placito,
Process. Verdict. aut Proce-
dendo quibuscunque ut necessarius nos
ignitur volentes Error, si quis
fuerit, juxta Formam Statuti pre-
dicti corrigi & Partibus praed.
plenam & celeberrimam Justiciam fieri
in hac Parte vobis mandamus,
quod si Iudicium reddidit ac Ad-
judication. Execution. ejusdem
Iudicii super Breue nostrum de
Sci. fa. adjudicat. sunt tam Re-
cord. & Process. praed. cum omni-
bus ea tangen. coram dictis Justi-
clariis de Comuni Banco, & Ba-
ronibus Scaccarii nostri praed. in
Camera Scaccarii in praedict. Die
Sabbati, videlicet secundo Die
Maii, prox. futur. Venire fac. eo-
ram dict. Justiciariis & Baronibus
nostris, & examinat. Record. &
Process. praed. ulterius inde Fieri
fac. quod de Jure & secundum
Legem & Consuetudinem Regni
nostri Anglia fuerit faciend., Teste
meipso, apud Westm.

Die . . . Anno Regni nostri
septimo.

Hartop versus Holt.

THE Plaintiff had Judgment in an Action of Debt in
this Court, a Writ of Error was brought in the Exche-
quer Chamber and the Judgment affirmed. Afterwards a Sci-
fa was brought quare Execution non, and an Award of Execu-
tion thereupon: Then a Writ of Error was brought tam in
Redditione Iudicii quam in Adjudicatione Executionis, &c. which
was allowed by the Clerk of the Errors, pending which Writ,
the Plaintiff took out Execution; and now a Motion was made
to set it aside, because it was sued forth when there was a Writ
of Error depending, which is a Superfedeas.

N n n

The

S. C. 1 Salk.
263.

Skin. Rep.
190, 191.
Comb. 12,
264.
Fitzgib. 175.
Mod. Ca. in
Law and Equ.
1st part, 121,
147, 373.

The Question was, Whether a Writ of Error would lie in the Exchequer-Chamber, upon an Award of an Execution of a Judgment upon a Sci' Fac' now after an Affirmance of the first Judgment?

* Cro. Car.
286. Nevell
ver. South.
1 Roll. Abr.
929.

It was admitted, That the Statute gives a Writ of Error upon Judgments in seven Actions only, of which a Sci' Fa' is none; but it being for Execution of a * Judgment in an Action of Debt, 'tis within the Meaning and Equity of the Act, which was to relieve as well against an erroneous Execution as an erroneous Judgment; so that may be affirmed, and yet the Execution reversed.

Cro. Car. 464.

Mod. Rep. 79

This was the Opinion of my Lord Hale; and the Reason by him given was, That a Judgment in a Sci' Fa' grounded upon one of those Actions mentioned in the Statute, is in Effect a Part of the first Suit, and they having Cognizance of the original Action, have also Cognizance of all the Dependences.

But the Plaintiff shall not be Judge whether this Writ of Error be well brought or not; 'tis Prima Facie a good Superedeas to his Action, and he must not undertake to determine the Validity thereof after 'tis allowed; therefore he ought not to take out Execution without Leave of the Court, or without pleading it in Abatement, or Demurring.

Yelv. 159.
Prowse ver.
Turner.
Quere tamen
at the End of
the Cause.
Earl of Straf-
ford ver. Need-
ham.
Sid. 143.
* Whitton
ver. Preston,
Sid. 240.
1 Cro. 464.
Comb. 19,
229, 293,
294.
Hob. 72.
Yelv. 157.
1 Venr. 168.
1 Sid. 236,
320.

On the contrary it was said, That a Sci' Fa' was a judicial Writ, and the Award of Execution upon it, is not such a Judgment upon which a Writ of Error will lie in the Exchequer-Chamber; 'tis not a Judgment upon any of the seven Causes of Action mentioned in the Statute, and therefore such a Writ of Error hath been disallowed upon a Judgment in Scandalum Magnatum, and likewise upon a * Judgment on the Statute of Usury, for taking more than 6 l. for the Loan of 100 l. but it hath been allowed upon the Statute of Cities, for that gives an Action of Debt.

Afterwards in Michaelmas Term, the Court gave Judgment, viz. The Design of the Act of Parliament was to give a Writ of Error upon the Merits of the Case; but here the Right is determined, and the Writ of Error is brought upon the Award of Execution; so that the Exchequer-Chamber have no Authority after they have affirmed the first Judgment: Therefore the Writ of Error is no Superedeas.

Johnson

Johnson *versus* Lee. Hill' Anno 3.

Berks ff. **M**emorand. quod al. scilicet Termin. Pasc. ult. præterit. coram Domino Rege & Domina nup. Regina Maria apud Westm. ven. Will'us Johnson gen. qui tam pro Domino Rege & dicta Domina nup. Regina quam pro seipso in hac parte sequitur per Thomam Chadwicke Attorn. suum & protulit. in Cur. tunc ibidem quandam Billa suam versus Godfrid. Lee gen. in Custod. Mar' &c. de placito transgr. & contempt. contra eos qui secut. sunt Placitum in Cur. Christianitat. post prohibicon. Regiam eis prius inde in contrar. direct. & deliberat. & sunt pleg. de prosequen. scilicet Johannes Doe & Ric'us Roe quæ quidem Billa sequit. in hac verba. sc. Berks. sc. Will'us Johnson gen. qui tam pro Domino Rege & Domina Regina quam pro seipso sequit. in hac parte querit. de Godfrido. Lee gen. in Custod. Mar. Marefc. Domini Regis & Domine Regine coram ipsis Rege & Regina existen. de Placito transgr. & contempt. contra eos qui secut. sunt Placitum in Cur. Christianitat. post prohibicon. Regiam eis prius inde in contrar. direct. & deliberat. pro eo videl't quod cum secund. leg. & consuet. hujus Reg. Angliæ omnia & singula Pli'ta & cog. Placit. de quibuscunque debet. contract. transgr. super casu. expens. sive feod. infra hoc Regn. Angl. contingen. sive emer-

gen. cæteraque hujusmodi Placita & negotia & eorum Placitorum cognicon. ad dictos Dom. Regem & Dominam Reginam nunc & coron. suam Regiam specialit. spectant. & pertinent. ac per communem legem terræ hujus Regni Angliæ & non in Cur. Christianitat. per leges sive Censuras Eccl. ullo modo triari terminari aut discutiti debeant & semper hætenus debuer. & consuever. cumque etiam per quendum Actum in Parlamento Dom. Henr. nuper Regis Angliæ Octavi. Anno Regni sui vicesimo tertio tent. edit. & provis. inter alia inactitat. fuit autoritate ejusdem Parlamenti quod nulla persona foret citat. summonit. vel alit. vocat. ad compar. per seipsum vel seipso aut per aliquem procurator. coram aliquo Ordinatio Archidiacono Comissar. Official. aut aliquo al. Judice spiritual. extra Dioces. vel peculiar. Jurisdic. ubi eadem persona quæ foret sic citat. summonit. vel alit. vocat. foret inhabitans [Anglice Dwelling] tempore adjudicacon. sive emanacion. ejusdem citacon. sive summonicon. nisi foret per in vel super certis Causis in eodem Actu particularit. except. mencionat. quodque nullus Archiepisc. neque Episcop. Ordinar. Official. Comissar. vel aliquis al. substitut. vel Ministr. aliquorum præd. Archiepisc. Episc. Archidiacon. vel aliorum ten. aliquam Spiritual. jur. ad

ad aliquod tempus a Festo Pasc. prox. sequen. post edicon. actus præd. petent demandant caperent vel reciperent de aliquibus subdit. dict. Domini Regis aliquam summam vel summam pecuniarum pro figl. actiō. alicujus citationis post præd. Festum ad iudicat. vel obtemperant. tres Denar. Sterling. super pennis & pennis. in eodem actu content. & limitat. pro ut per eundem actum (relation. inde habet.) plenius liquet & apparet cumque etiam præd. Will'us Johnson modo sit & per factum duorum Annorum jam ult. elapsi. fuit residen. & inhabitans apud Paroch. de Hungerford in eodem Com. Berks infra peculiar. Jur. Decani de Sarum ac infra Dioces. statum & non est nec infra spatium debitorum Annorum jam ult. elapsi. fuit inhabitans sive residen. infra Civitat. London. vel Suburbium ejusdem Civitatis neque alibi infra Dioces. Cantuar. scilicet liber homo hujus Regni Anglie jam existit & sic per totum tempus vite sue existit ac remanet inde omnibus & singulis libertatibus privileg. & libertatibus consuetud. hujus Regni Anglie hostes leges Domini Regis & Domine Regine nunc & progenitorum suorum super Regum & Reginarum hujus Regni Anglie usat. & approbat. gaudere debeat præd. tamen Godfridus Lee prædict. non ignarus sed machinatus ipsum Will'm Johnson contra debet. hujus Regni Anglie fornam opprimere & dict. Dominum Reg. & Dominam Reginam nunc exhereditare ac cog-

nicon. Placiti quæ ad Cur. dict. Domini Regis & Domine Regine nunc pertinet ad illud examen in Cur. Christianitat. trahere ipsi sunt Will'm Johnson. primo die Septembris. Anno Regni dict. Domini Regis & Domine Regine nunc quinquagesimo apud Hungerford in Com. Berks præd. & infra peculiar. Jur. Decani de Sarum ac infra Dioces. Sarum Citari causavit ad compareri. coram venerabili viro Georgio Oxenden leg. Doctore Alm. Cur. Cantuar. de Arcubus London. Official. principal. ejusve Surrogat. aut al. Iudice spirituali. in ea parte competenti in Aula [voc. Doctores Canonici] scilicet. infra Civitat. London. secundo die Octobr. extunc prox. sequen. ad quem diem & locum præd. coram præfati Georgio Oxenden tunc Iudice spirituali. (eodem Will. Johnson secundum exigent. citation. præd. compareri.) præd. Godfridus Lee adtunc & ibid. curam præfati Iudice spirituali. petiit de eodem Will'o Johnson pro feod. & expens. separatim denar. summas in toto se attin. ad quind. libr. quatuor solidi. & octo denar. in Sched. libello posthac mentionat. annex. particularit. express. scilicet pro denar. expendit. quinque libr. & octo denar. & pro feod. decem libr. & quatuor solidi. caute & subdole versus ipsum Will'm Johnson libellando quod ipse Godfridus Lee fuit & est procurator. Cur. consistor. Episcopi London. ac quod in vacacon. post Terminum Sancte Trin. Anno Domini 1683. vel Term. Sancte Mich. prox. & immediate sequen. dictus

dictus Willielmus Johnson tunc minor existens. Annos agen. viginti. & disaid. sed vicissimum primogenit. suz ante tunc temporis non compleverit & eadem causa person. habilem standi in iudicio ad recuperan. legatum per Will'm Johnson ejus avum nuper defunct. sibi relict. & donat. non habend. quandam Margaretam Christian Vid. Curatorem sibi ad Officium præd. dicto Will'o Johnson assign. onus curacon. in ea acceptavit eademque Margareta Christian & dictus Will'us Johnson vel aliquis al. amicus dicti Will'i Johnson consuever. seu eorum alt. consuevit dictum Godfrid. Lee de prosequen. legitime contra quosdam Rich'm Price & Thomam Battall Executor. Test'i dicti Will'i Johnson defunct. ad exhiben. inventon. & reddend. computum de Bonis & Catallis præd. Will'i Johnson defunct. fecer. dictum Godfridum Lee procurator. ad prosequen. causam. præd. Item quod dictus Godfridus Lee in vacation. ante Termin. Sancti Mich'is & ipso Term. Sancti Mich'is Anno Domini 1683. supradicto citacon. contra dict. Richardum Price & Thomam Battall Executor. test. dicti Will'i Johnson defunct. ad exhiben. inventon. & computum bonorum dicti Will'i Johnson defunct. & ad responden. dict. Willielmo Johnson jun. per dict. Margaretam Christian ejus curatric. assign. in causa subtraction. legat. præd. sub Sigillo Cur. consistor. Episcopali London. misit & in dict. Rich'm

Price personalit. exequaturavit & dict. Executor. pro non comparen. juxta tenor. cujusdam decreti viis & modis in dicta Cur. consistor. Episcopali London. pro contumacon. sua excommunicari procuravit ac quod omnia & singula feod. & totare pecunie summe in eadem Scheda specificat. ex consuetud. Cur. consistor. Episcopali a tempore immemorat. & in presenti sunt debita & debite solven. Advocat. Procurator. Registeris & al. Ministr. dicte Cur. prout in eadem Scheda continetur & quod præfat. Will'us Johnson solucion. feod. & ceterarum pecun. summarum in dicta Scheda mentionat. & expressi. in se suscepit & promisit solvere præfat. Godfrido Lee sed nondum solvit aut satisfecit prout per Copiam libelli & Scheduli adinde annex. hic in Cur. prolat. lect. & audit. plenius liquet & apparet ac licet ipse præfat. Will'us Johnson, ad aliquod tempus infra sex Annos ante diem exhibition. querel. sive libelli præfat. Godfrido Lee præd. non assumpsit super se ad solven. præfat. Godfrido Lee debit. feod. seu expens. in Scheda, libello præd. annex. mentionat. vel aliquem inde partem licetque præfat. Judici spirituali. manifeste per libellum præd. apparet quod præfat. Will'us Johnson fuit infra ætat. Viginti & unius Annorum ubi festa præd. versus præfat. Rich'm Price & Thomam Battall prosecut. fuit per præd. Godfridum Lee licetque etiam idem Will'us Johnson omnia & singula præ-

præmissa præd. per ipsum Will'm Johnson super. suggest. & allegat. in præd. Cur. Christianitat. coram præfat. Iudice spiritual. in exoneration. suam & dimission. ibid. in præmiss. sepius placitavit allegavit & il. inevitabili testimon. & veritat. probare obtulit idem tamen Iudex spiritual. Placitum allegation. & probat. il. admittere seu recipere penitus recusavit & præd. Godfridus Lee ipsum Willielmum Johnson per definitivam dict. Cur. Christianitat. senten. de & super præmissis præd. condemnare ac ipsum Will'm Johnson ad solven. eidem Godfrido Lee omnia & singula feod. & expen. in Scheda libello præd. annex. mentionat. compellere tot. suis viribus conatur & indies machinatur in dict. Domini Regis & Domine Regine nunc contempt. & in ipsius Will'i Johnson grave dampnum præjudicium gravamen. & depauperation. manifest. ac contra form. statuti præd. ac licet Breve dict. Domini Regis & Domine Regine nunc de prohibition. præfat. Godfrido Lee in hac parte Decimo die Martii, Anno Regni dicti Domini Regis & Domine Regine nunc Sexto apud Hungerford præd. in Com. præd. in contrarium inde direct. & deliberet fuit idem tamen Godfridus Lee Placitum præd. post prohibition. regiam prius ei in contrar. inde in forma præd. deliberat. postea scil't decimo quarto Martii, Anno sexto supradicto, apud Hungerford præd. in Com. Berks præd. ult. prosecut. & in Placito il. processit dict. Brevi

dict. Domini Regis & Domine Regine nunc de prohibition. in forma præd. direct. in contrar. inde quovis modo non obstante in dict. Domini Regis & Domine Regine nunc contempt. & ipsius Will'i Johnson dampnum præjudic. depauperation. & gravamen manifestum unde dicit quod deteriorat. est & dampnum habet ad valen. quadraginta librarum & inde tam pro Dom. Rege & Domina Regina quam pro seipso in hac parte producit Sextam, &c.

Et modo ad hunc diem, scilicet, diem Mercurii prox. post Octab. Sancti Hillar. isto eodem term. usque quem diem præd. Godfridus Lee habuit licen. ad billam præd. interloquen. & tunc ad responden', &c. ante quem diem præd. nuper Domina Regina Maria diem suum clausit extremum coram Dom. Rege apud Westm. ven. tam prædictus Will'us per Attorn. suum præd. quam præd. Godfridus per Johannem Lee Attorn. suum & idem Godfridus defen. vim & injur. quando, &c. & omnem contempt. & quicquid, &c. & dicit quod ipse non secut. est Placitum in præd. Cur. Christianitat. post prohibition. regiam ei in contrar. inde direct. & deliberat. modo & forma prout prædictus Will'us Johnson qui tam, &c. superius versus eum queritur & de hoc pon. se super patriam & præd. Will'us Johnson qui tam, &c. inde similiter, &c. sed per Breve dict. Domini Regis de consultation. in hac parte impetran. idem Godfridus protestan. quod

quod præd. Willus Johnson in ead. Cur. Christianitat. superius mentionat. non placitavit seu allegavit quod ipse idem Willus ad aliquod tempus infra sex Annos ante diem exhibition. querel. sive libelli ipsius Godfridi præd. non assumpsit super se ad solven. eidem Godfrido debit. feud. seu expens. in Schedul. libello præd. annex. menconat. vel aliquam inde parcel. prout præd. Willus Johnson superius allegavit pro Placito idem Godfridus dicit. quod in eodem actu in Nar. præd. Willi Johnson mentionat. inactitat. fuit quod nulla Persona foret citat. summonit. vel alit. vocat. ad comparen. per seipsum vel seipsam aut per aliquem procurator. coram aliquo Ordinari. Archidiacono Commissar. aut aliquo al. Judice spiritual. extra Dioces. vel peculiar. Jur. ubi eadem Persona quæ foret citat. summonit. vel alit. vocat. foret inhabitan. [Anglice **Dwelling**] tempore adjudication. sive emanation. ejusdem citation. sive summonition. sub Poenis & poenalitat. in eodem actu mentionat. except. foret in casu quod aliquis Episcop. aut aliquis Judex inferior habens sub ipsum jurisdiction. in suo jure & titulo vel per commission. requisition. vel instan. faceret Archiepiscopo, Episcopo, vel alicui superiori Ordinario ad capiend. tract. [Anglice **Treat**] examinand. vel determinand. materiam coram ipso vel ejus substitut. & id solummodo facien. in casibus ubi Lex Civilis vel Canonialis affirmat execution. tal. requisition.

vel instan. jurisdiction. legal. seu tolerabil. esse & except. in quibusdem al. Casibus in eodem actu specificat. prout in eodem actu plenius continetur & idem Godfridus ulterius dicit quod ipse per spacium Vingtinti & quatuor Annorum & amplius jam ult. elaps. fuit & adhuc est unus procurator Cur. Consistor. Episcopi London. quodque ipse idem Godfridus Vicefimo Septimo die Octobris, Anno Domini 1683, apud London. in Paroch. Sancti Benedicti prope ripam Paulan. in Warda de Castle-Baynard retent. fuit fore procuratorem ipsorum Margaretæ & Will'i in eadem Cur. consistor. in Causa infra mentionat. & tunc & ibidem ad instan. & requisition. præd. Margaretæ & Willielmi Johnson citation. contra dict. Richardum Price & Thomam Battall Executor. Test'i præfat. Willielmi Johnson defunct. Avi dict. Willielmi qui tam, &c. ad exhiben. inventarium & computum bonorum præfat. Willielmi Johnson defunct. & ad responden. dicto Will'mo Johnson modo quer. per dict. Margaretam ejus Curatricem per eandem Cur. assign. in Causa subtraction. Legat. præd. per præd. Willielmum Johnson defunct. ei donat. sub Sigillo Cur. Consistor. Episcopal. London debito modo prosecut. fuit. & eandem citation. in dictum Richardum Price personalit. exequi causavit & dict. Executor. pro contumacia sua in non comparend. juxta tenor. ejusdem per debitum legis cursum Excommunicari procuravit quodque

quodque omnia & singula feod. & denar. summæ in Scheda præd. specificat. juxta eadem Godfrido devener. pro feod. & expens. suis in Lite five Secta præd. & quia præd. Willielmus Johnson modo quer. & præd. Margareta licet sapius requisit. feod. & expens. præd. eidem Godfrido solide recusaver. præd. Godfridus eundem Willielmum Johnson modo quer. pro recuperation. denar. in præd. Scheda specificat. in Cur. peculiar. Jurisdiction. Decan. Sarum sectare intendebat & conabatur sed Robertus Woodward Legum Doctor, Decan. Ecclesie Cathedral. Sarum Judex Cur. peculiar. Jurisdiction. præd. habens Jur. ibid. in jure suo per quoddam scriptum suum Sigillo suo sigillat. quem idem Godfridus hic in Cur. profert geren. dat. vicesimo quinto die Februar. Anno Domini 1692. requisivit venerabil. præd. Georgium Oxenden Legum Doctor. & almæ Cur. Cantuar. Judicem vocan. eundem Willielmum Johnson per nomen Willielmi Johnson de Hungerford in Com. Berks infra peculiar. Jur. dict. Decani coram ipso eodem Georgio Oxenden vel aliquo al. competen. judice dict. Cur. ad responden. dicto Godfrido Lee in Causa & subtraction. feod. & quod Causa præd. audit. & determinat. in eadem Cur. secundum legem & justitiam prout per scriptum præd. plenius liquet & apparet & idem Godfridus ulterius dicit quod Lex Civilis vel Canonical. affir-

mat. execution. tal. requisition. vel instan. Jur. legal. vel tolerabil. esse super quo idem Godfridus præd. Will'um Johnson citari causavit ad compareri. coram præfat. Georgio Oxenden Legum Doctore Almæ Cur. Cantuar. de Arcubus London. Official. principal. ejusve Surrogat. aut al. Judice competen. in aula [vocat. ~~Doctors Commons~~] scituat. infra Civit. London. secundo die Octobris jam ult. elaps. & in eadem Cur. ante prohibition. præd. eidem Godfrido deliberat. præd. Willielmum modo quer. pro feod. & expens. præd. traxit in Placitum prout ei bene licuit feod. & expens. il. tunc & adhuc eidem Godfrido debet & insolut. existen. quæ est eadem prosecutio & in Placitum tractio unde idem Willielmus Johnson superius queritur & hoc paratus est verificare inde per Judicium & Breve Domini Regis de consultation. sibi concedi, &c.

Et præd. Willielmus Johnson qui tam, &c. dicit quod per aliqua per præd. Godfridum Lee superius Placitando allegat. Breve dicti Domini Regis de consultation. eidem Godfrido Lee in hac parte concedi minime debet quia protestando quod præfat. Godfridus Lee non retent. fuit fore procurator præd. Margarete & Willielmi Johnson ad prosequen. præd. Thomam Price & Thomam Battall prout præd. Godfridus superius inde Placitando allegavit protestandoque etiam quod Lex Civilis vel Canonical. non præ-

præfat. Georgio Oxenden fact. ad
 tenen. Placitum præd. in Placito
 præfat. Godfredi mentionat fore
 legal. vel tolerabil. pro Pl'to ta-
 men idem Will'm Johnson dicit
 quod placit. per præd. Godfridum
 Læ quod requisition. præd. Ro-
 berti Woodward Decani Eccl.
 Cathedr. Sarum præd. Georgio
 Oxenden fact. ad vocan. præfat.
 Will'm Johnson coram ipso præ-
 fat. Georgio Oxenden vel al.
 Judice competentis dict. Cur.
 Cantuar. ad responden. dicto
 Godfrido in Causa præd. pro
 substra. feod. & quod Causa
 illa determinat. fuit modo &
 forma præd. superius Placitat.
 materiamque in eodem content.
 minus sufficien. in lege existunt
 ad ipsum Godfridum ad Breve
 dict. Domini Regis de consulta-
 tion. in ea parte impetran. ad
 quod idem Will'm necesse non
 habet nec per legem terra tene-
 tur aliquo modo respondere &
 hoc parat. est verificare unde pro
 defect. sufficien. respons. in hac
 parte idem Will'm Johnson pet.
 Judicium & dampna sua præd.
 occasione præd. sibi adjudicari.
 &c. & præd. Godfridus dicit
 quod Placitum præd. per præd.
 Godfridum quoad requisition.
 præd. Roberti Woodward. præd.
 Decani præd. Eccl. Cathedral.
 Sarum præd. Georgio Oxenden
 fact. ad vocan. præfat. Will'm

Johnson coram ipso præfat. Geor-
 gio Oxenden vel alter Judice
 competen. dict. Cur. Cantuar.
 ad responden. eidem Godfrido
 in causa præd. pro substra. feod.
 præd. & quod Causa illa
 determinat. in eadem Cur. Can-
 tuar. determinat. fuit modo &
 forma præd. superius Placitat.
 materiamque in eodem content.
 bon. & sufficien. in lege existunt
 ad ipsum Godfridum ad Breve
 dict. Domini Regis de consulta-
 tion. in hac parte impetran. quod
 quidem Placitum materiamque in
 eodem content. idem Godfridus
 parat. est verificare & probare
 præd. Cur. &c. & quia præd.
 Will'm Johnson ad Placitum
 il. non respon. nec il. hucusque
 aliquant. dedit idem Godfridus
 ut prius pet. Judicium & Breve
 dict. Domini Regis de consulta-
 tion. in hac parte sibi concedi.
 &c.

B. 2.

Et quia Cur. dict. Domini Re-
 gis nunc hic de Judicio suo de
 & super præmissis redder. non-
 dum advisatur dies inde dat. est
 partibus præd. coram Domino
 Rege apud Westm. usque diem
 prox. post

de Judicio suo de & super
 præmissis al. audien. eo quod
 Cur. dict. Domini Regis nunc
 hic inde nondum, &c.

P p p

Johnson

Johnson *versus* Lee.

Stat. 23 H. 8.
cap. 9.

Vide 1 Salk.

40, 41.

2 Lev. 55,

90, 173.

1 Lev. 193.

1 Saund. 402.

Comber. 105,

106.

Carthew 33,

34, 476.

2 Salk. 548,

549.

IN a Prohibition, the Plaintiff declared, that by the Statute 23 H. 8. cap. 9. it is enacted, That no Person shall be cited to appear out of his Diocese where he dwelleth: That the Plaintiff was resident at Hungerford in Berks, in the Diocese of Salisbury; that the Defendant caused him to be cited before the Dean of the Arches in London, and libelled against him for Expence and Fees in the Consistory-Court of the Bishop of London, and did aver, That such Fees were justly due according to the Custom of the said Court, and that he promised to pay it: And although he made no such Promise within six Years, yet the Court proceeded to give Sentence against him; and the Defendant prosecuted his Plea after the Writ of Prohibition delivered to him,

The Defendant for Consultation pleads the very same Statute; by which it is enacted, That no Person should be cited or summoned, or otherwise called to appear by himself or herself, or by any Proctor, before any Ordinary, Archdeacon, Commissary, Official, or any other Spiritual Judge, out of the Diocese, or peculiar Jurisdiction, where the Person which shall be cited, summoned, or otherwise called, shall be inhabiting and dwelling at the Time of the awarding the same Citation or Summons; except (amongst many other Causes in the said Act mentioned) that any Bishop, or any other Inferior Judge, having under him Jurisdiction in his own Right and Title, or by Commission, make Request or Instance to the Archbishop, or other Superior Ordinary or Judge, to take, treat, examine, or determine the Matter before him or his Substitute; and that to be done in Cases only where the Civil Law or Common Law doth affirm Execution of such Request or Instance of Jurisdiction to be lawful or tolerable.

That the Defendant is a Proctor in the Consistory-Court of the Bishop of London, and was retained as such by the Curatrix of the Plaintiff (he being then under Age,) to prosecute a Suit against the Executors of his Grandfather for a Legacy given to the Plaintiff, and to exhibit an Inventory; that they were excommunicated for Contumacy in not appearing, and that the Fees and Expences in the Libel were justly due to him for prosecuting the said Suit. That he endeavoured to sue the said Plaintiff for the Recovery of the said Fees in the Court of Peculiars of the Dean of Salisbury; but he being Judge of the Court,

Court, and having Jurisdiction in his own Right, did, by a Writing under his Seal, require the Dean of the Arches to call the Plaintiff before him, to answer the Defendant in a Cause for Subtraction of Fees; which Cause was there determined accordingly: And the Defendant avers, that the Civil and Common Law affirmeth the Execution of such Request to be lawful: Whereupon the Defendant, before the Prohibition delivered to him, did cite the said Johnson to appear before the said Judge of the Arches in the Cause aforesaid, and avers it to be the same Prohibition of which the Plaintiff complained.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

1. It was argued, That no Consultation ought to go; for if the Defendant will bring himself out of the Statute, he must shew, that the Request made by the Inferior Ordinary was made to him who had the next Superior Jurisdiction; which he hath not done: For here the Request is from the Dean of Salisbury, who was Judge of the Peculiar, to the Dean of the Arches, when it ought to have been to the Bishop of Salisbury, being the next immediate Ordinary, unless it appear that a Peculiar is such a Jurisdiction from which there is no Appeal to the Ordinary; or that it is a Jurisdiction by Prescription.

Vide 1 Salk.
40, 41.

2 Roll. Rep.
446, 448.
Gustrel *versus*
Jones.

The Judge of this Peculiar is an Inferior Person to the Bishop, and the Peculiar itself may be subordinate to him; if so, he cannot transmit a Cause per Saltum to the Archbishop, but must leave it to the Ordinary from whom his Power is derived.

Hob. 16, 186.
Jones *versus*
Jones.
1 Sid. 90.
Cro. Car. 262.

2. The Defendant doth not say, That this was a Case which was permitted by their Law, but only that the Civil or Canon Law affirmeth such Request, which is in the Disjunctive, and very uncertain.

3. He alledged, That the Dean of Salisbury did request the Dean of the Arches to call the Plaintiff before him, to answer in a Cause for Subtraction of Fees; and the Libel is for Subtraction of Fees and Expences, which is larger then the Request, and therefore not good.

1 Mod. 167.
2 Keb. 810,
845.

4. But the principal Point was, Whether the Defendant ought to sue for Fees in the Ecclesiastical Court, since such Things are properly cognizable at Common Law, for which he might

3 Keb. 203.
Comber. 237.
Cases in Law
and Equity
262, 263.

Carthw. 337.
Carthw. 376.

might have a Quantum Merit, as an inhabitant Assumpsit, upon the Petition per Orem Labor, and the Attorney laid out, and the Law raised the question, whether there is any difference between Fees in the Prerogative Court, and other Courts of Equity, in which Suits are usually brought in this Court. The Chief of which Courts may be given in Evidence at the Trial, and especially in this Case, which is grounded upon Prescription for Customary Fees due there out of Court, which shall be tried by a Jury.

If it be objected, That Proctors Fees are Part of the Cause; this cannot be, because when the Suit is determined, it cannot be afterwards continued for the Fees; and some of the Fees in that Court are settled by Act of Parliament, which are those relating to Writs.

Carthw. 169.

Neither can it be objected, That because this Court will not grant a Mandamus to release a Proctor when removed from his Office, therefore you will not grant a Prohibition when he files a Returnment for his Labor and Retainer; the Laws of England take Notice of such Suits. But this Court will not take Determination thereof to a proper Court.

Cases in Law
and Equity
264.

It is true, there is no President of any Suits here for Proctors Fees; and it is as true, there are likewise no Presidents of such Suits for Fees in Chancery: But they may be well compared under the general Terms for Wages and Labor, and are taken upon a Custom and Contract, which are Things taken at Common Law.

Roll. Rep. 59.

It is true, a Prohibition to the Court-Christian had been denied by this Court, where the Libel was for Proctors Fees; but it was not for that Reason alone, for the Cause alleged for Prohibition was, That the Suit for which the Fees were laid out was not determinable in that Court. But the Judges thought it reasonable not to prohibit the Proctor to sue there, for he is only a Servant, and is not to take upon him to determine whether that Court had any Jurisdiction or not of the Cause.

Mich. 25
Car. 2. C. B.
1 Mod. Rep.
167.

In the Case of Hutton and Wilson, a Prohibition was likewise denied to the Spiritual Court, where the Suit was for Proctors Fees; but there was but one Instance in the Common Pleas when that Rule was given: The Chief Justice was against the Prohibition, and the puisne Judges say so, for he was of Opinion, That such Fees ought not to be demanded in the Spiritual Court, because the Plaintiff had a Remedy at Law; for the Returnment implied a Contract, for which an Action on the Case will lie.

Heo. Wychling was then the Lord Judge: but not clear of Opinion on either Side. But when the Court held, That the Plaintiff, amongst other Things, demanded a customary Fee of 4d. in every Writement. They was read in the Cause, that the Law might be determine, whether such a Fee was customary or not. And why not in this Case, where the Defendant hath protested for certain Fees, Time out of Mind?

Reply, They ought to allow the Plea of Non Assumpsit infra sex Annos, for the Statute of Limitations extends as well to that Court as to Courts of Equity.

On the other Side it was argued, 1. That the Letter of Request was to the next immediate Ordinary; and if it had appeared that this Jurisdiction had been subordinate to him, it would have altered the Case: But the Plaintiff having alleg'd, that it is a peculiar Jurisdiction, the Letter of Request may be properly made from such to the Archbishop himself.

2. If it had been free by a general Exemption from all Ordinary Jurisdiction, which was common, as my Lord Hobart tells us, in Monasteries before the Dissolution, then the Cause must be remitted to the King; for this Act was made as well for the Preservation of the Jurisdiction of the Ordinary, as for the Ease of the People: For otherwise the Archbishop may call a Cause to him, which is in none of the Cases within the Power given him by this Act, and then it will be totally eluded.

3. It is not enough for the Plaintiff to say, That he lived in the Parish of Hungerford, within a peculiar Jurisdiction of the Dean of Salisbury, ac infra Diocesi Sarum; but he ought to shew that the Peculiar was subordinate to the Bishop of Salisbury, being to deprive the Spiritual Court of a Jurisdiction which they had before the making this Act.

4. As to the Objection, That the Libel is larger than the Request, one being for Fees and Expences, and the other being to answer in a Cause for Subtraction of Fees only; this is not material, because such Fees must be intended as paid to others, as well as for such as were due to the Plaintiff.

5. This Suit is within the Cognizance of the Ecclesiastical Court, of which a Proctor is an immediate Officer; and Fees are incident

2 Lev. 64.
Skin. Rep.
493 to 498.
Ca. in Law
and Equ. 12,
64, 386, 439,
440.
1 Vent. 274.

incident to Suits commenced there; and they having Cognizance of the Subject Matter for which said fees were expended, the Determination thereof is also incident to the original Cause: They have Power over him, and the fees demanded by him, and may lessen and abridge them as they see Occasion; and by the same Reason that they may prohibit the Payment thereof, by the same Reason they may order the Payment.

March 45.

If the Doctor had petitioned the Court, and not proceeded by way of Libel for his fees, in such Case a Prohibition would not lie; so that there can be no Inconvenience in allowing this Jurisdiction, for they are the proper Judges of what Business is done in their Courts, and can call for Vouchers better than a Jury can do.

Their Fees are established by the Canon Law, and are lessened and restrained by the Power and Authority of the Court. Rules are made here, to oblige the Attornies in Matters of Practice; and the like Rules are made there, to oblige the Proctors and Ministers of the Court; so that they must be allowed to be the proper Judges in this Matter.

Moore 25.
Plo. 2.
Justices Reg.
58.
Skin. Rep.
494.
Raym. 464,
465.
Gob. 260.
Greenway
ver. Baker.
Comh. 71, 109,
110, 462,
463.
Fitzgibb 197,
198.
Mod. Ca. in
Law and Equ.
1st part, 379.
Tho' Serjeant
Harris argu'd,
That a Recognizance taken
there to stand
to the Order of
the Court, was
101 l.
Noy 24.
Raym. 3.
2 Sid. 81.
1 Vent. 165.

Matrimony, and Things testamentary, were at first the whole Business of that Court; but now in Cases where they have original Jurisdiction, they do retain Suits even for such Matters which may be tried at Law, as a Libel may be there for not repairing a Way leading to a Church.

This Case may be compared to that where a Prohibition was prayed to the Court of Admiralty, because instead of Stipulation (which is a Recognizance in their Law as much as Bail is here) they had taken a Recognizance at Common Law, wherein the Principal and Sureties, and their Heirs, Goods, and Lands were bound; whereas the Libel ought to be against the Ship and Goods, and Execution against the latter, and not against the Party: But the Civilians argued, That Execution might be taken of the Body, tho' not of the Lands; and that this was not in the Nature of a Recognizance, but a Stipulation in Nature of Bail, and might be sued as well in the Court of Admiralty as at Common Law; and no Prohibition was granted, but the Matter was adjourned.

The Case in the Modern Report is an express Authority to rule this, where a Prohibition was denied for a Suit for Proctors fees, and there is no Book against it. The Reason of the Law is for the Plaintiff; for he being a Proctor, is not a Temporal Officer, and what he hath done is about an Ecclesiastical Suit, and therefore that Court must judge of it.

Lastly,

Lady. The Statute of Limitations doth not extend to this Case; for it is not properly a Debt, because Expenses and Fees are of the same Nature with the subject Matter for which they were demanded: It may as well be alledged, That defamatory Causes are within the Statute, so that the Ecclesiastical Court having original Jurisdiction of this Matter, no Prohibition ought to go: It hath been denied in the Common Pleas for Registers Fees, in a Cause between Gellin and Froggat. Adjourn.

Harris ver. Pett. Pasch. 8 W. 3. Rot. 173.

DEBT upon a Bond: The Condition thereof was, To free and keep harmless the Plaintiff off and from all Costs and Damages which may arise by Reason of a Law Suit, &c.

The Defendant pleaded Non Dampnificatus generally; and upon Demurrer to the Plea, the Question was, Whether such Plea was good or not? It was agreed, That if the Condition had been to keep harmless only, then Non Dampnificatus had been a good Plea; but it being to free and keep harmless, he ought to shew how he had freed him, and not answered the Dampnification alone: And to prove this, the Case of Brett and Andrews was cited, which was Debt upon Bond for Performance of an Award, in which, amongst other Things, it was awarded, That the Defendant should acquit, discharge, and save harmless the Plaintiff off such a Bond. And the like Plea was pleaded as in this Case, which was held insufficient, because the Defendant ought to shew how he had discharged him.

If the Award had been made, reciting a Suit in Chancery between the Parties, and that the Suit should cease, and the Plaintiff staret acquietatus pro qualibet Materia in præd' Billa, there a Plea quod stetit quietus inde is good enough, without shewing how, because he is acquitted by the Award itself, (viz.) staret acquietatus: But if a Man had been obliged to acquit another from a Debt or Suit, it is not sufficient to plead Non Dampnificatus generally, but he ought to shew how and in what Manner. And this was the Case of Freeman and Sleen.

To which it was answered, That Brett and Andrews's Case differs from that at Bar, because it was to acquit the Plaintiff from a peculiar Obligation; which Word Acquit implies, that it must be by Deed, and therefore he ought to shew by what Deed.

But

Vide 1 Sid.
444.

1 Mod. 43.

2 Keb. 619.

2 Saund. 83.

84.

4 Leon. 62.

1 Leon. 71.

Idem Owen

71.

Goldf. 63.

2 Co. 339.

1 Roll. Abr.

432.

Placito 2.

But this Condition was not to free and acquit the Plaintiff from a Suit, but to indemnify him from the Consequences of it, which are Costs and Charges; and the Defendant hath pleaded, That no Damage hath happened to him, so that it lies upon him to prove that he was damaged.

An Action of the Case was brought against the Defendant, who promised, That in Consideration the Plaintiff would discharge a third Person then under an Arrest, that he would pay the Money, and alleged in Facto, that he exoneravit. The Plaintiff had Judgment in the Common Pleas, and upon a Writ of Error in this Court, one of the Errors assigned was, That exoneravit eum was not good, without shewing how; but the Court held it well enough, and that it need not be as a Discharge of a Bond, or a Rent, which ought to be shewed in what Manner.

Cro. Eliz. 913.
King ver.
Hobbs.

2 Cro. 363,
364.
2 Rep. 4.
Maufer's
Case.
2 Saund. 84.
Co. Ent. 139.
b.

If this had been pleaded in the Affirmative, that he had freed and acquitted the Plaintiff, there he must shew how: But it being in the Negative, the Plaintiff ought to shew how he was damaged.

And of this Opinion was the Court, That it was a good Plea, because the Condition was to save the Plaintiff harmless from something that was incertain at the Time of the Making thereof, (viz.) from the Costs and Charges of the Suit, that no Costs might be recovered against him; but if it had been to save harmless from a particular Thing, there such a Negative Plea generally would not have done, because the Defendant ought to shew how he indemnified the other: Whereupon the Counsel perceiving the Opinion of the Court, moved to have Leave to discontinue the Action.

S. C. 2 Salk.
537.
Poll. 378.
Vide 6 Mod.
20.

Loveday *versus* Winter.

IN Trespass and Ejectment the Jury found a Special Verdict; the Substance whereof was, sc. George Pawlet was seized in Fee of the Manor of M. whereof the Lands in Question being Copyhold were Parcel: That upon the Marriage of Edward his eldest Son, he settled the Manor and Lands, &c. upon Trustees and their Heirs, to the Use of himself for Life, and after his Decease, to the Use of his Wife for Life, then to Edward Pawlet, and the Heirs of his Body lawfully to be begotten, Remainder to his own right Heirs.

Proviso,

Proviso, That it shall be lawful to and for the said George Pawlet and Elizabeth his Wife, by Deed indented, to make him in Possession for one, two, or three Lives, or for thirty Years, to commence after one, two, or three Lives, or for one other Term, determinable upon one, two, or three Lives, or in Reversion for one, two, or three Lives, or for thirty Years, or for any other Number of Years, determinable upon one, two, or three Lives, so as such Demise be not made of the ancient Demesne Lands, Parcel of the said Manor, or of any other Lands used therewith for the Space of seven Years, and so as the ancient Rent be reserved.

George Pawlet by Deed indented, reciting that the Lands were Coppelhold, made a Lease thereof to one Robert Blanchlow for thirty Years.

The Assize of the Plaintiff claims as heir in Tail to George Pawlet his Father.

The Question was upon this Proviso in the Marriage-Settlement, Whether this was a good Lease, or not?

Those who argued in the Negative insisted, That it was not warranted by the Power, either as to the Land itself, or as to the Term.

1. As to the Censure of the Land which is expressly found to be Coppelhold, but it could never be intended that he should make any new Estate of Coppelhold Lands, for the Estates he was to make are to be by Deed indented, and Coppelhold cannot be let by such Deed, so it is not within the Power, and the Acceptance of a Lease of the same Lands by a Coppelholder, is a Determination of his Coppelhold Estate.

The Exception is of all ancient Demesne Lands Parcel of the Manor, which are sufficient Words to exempt these Lands out of the Power of Leasing, for a Manor consists of Demesnes and Services, and these are not only found to be Coppelhold, but Parcel of the Demesne.

2. But if the Lands in Question had been comprehended under the general Words, yet the Lease made by George Pawlet is void, by Reason of the Term demised, for it is expressly against the Power reserved, which ought to be taken strictly against the Lessee.

R r r

And

Cro. Eliz. 5.
2 Cro. 318.
Hocomb ver.
Hawkins.
Yelv. 222.
Idem.
6 Rep. 33. a.
8 Rep. 70. b.

And therefore where a Manor is in Lease, and he who hath the Reversion in Fee levies a Fine to the Use of himself for Life, then to his eldest Son in Tail, but reserved a Power for him to make Leases for twenty-one Years, who made a Lease before that in Being expired, to begin after the Determination thereof; it was adjudged void, for it ought to be a Lease in Possession, and not an Interest to begin in futuro.

To which it was answered,

Terms of
Law, Title
Demesns 114.

That as to the Objection, That the Proviso did not give George Pawlet any Power to make Leases of Cophhold Lands, because they are Parcel of the Demesns of the Manor, for nothing but the Capital House, and the Lands therewith occupied, are properly the Demesns of a Manor: But in the simple Acceptation of the Word, no Person hath any true Demesns, because all Land dependeth on the Crown; that is the Reason why in Pleading it is usually said, That such a Person was seised in his Demesns as of Fee.

A Manor consists of Demesns and Services, and nothing else: Now if the Demesns cannot be let, then the Power given by this Proviso signifies nothing, for Services are not Lands, and therefore nothing can be leased; and these Powers are not to be construed according to Strictness of Law, but as Words used by Lawyers to signify their Meaning.

For which Reason, these Words, (viz. So as the Demise be not made of the antient Demesns Lands of the Manor) must be taken according to the common Acceptation thereof; that is to say, a Lease shall not be made of any Lands usually occupied with the Capital Messuage.

Then as to the Term demised, which, as hath been objected, ought not to have been for thirty Years absolute, but determinable upon one, two, or three Lives.

Skin. Rep.
192.
6 Rep. 65.

Curia. Cophholds in Strictness are Part of the Demesns of the Manor, because the Tenancy being at the Will of the Lord, the Lands are supposed to be always in his Hands; but in vulgar Acceptation it is otherwise. Now the Lands which were in Lease for Lives, are not Parcel of the Manor during the Continuance of the Lease, but the Reversion thereof, is Parcel. Adjournatur.

Petit

Petit *versus* Smith.

THE Testator by his last Will appointed two Executors, and gave each of them a Legacy of 5*l*. and did not dispose the Residue of his Estate.

The Will was proved in Common form, and the Daughter of the Testator sued in the Spiritual Court for a Distribution; for that the Executors ought to have nothing by Virtue of their Executorship, because they had express Legacies devised to them by the Will, which shews that the Testator intended them no more. Whereupon the Court compelled them to exhibit an Inventory of the Personal Estate, in order to make a Distribution. And now they moved for a Prohibition, suggesting that the Ecclesiastical Court had not such a Power, but only in Cases where the Parties die Intestate, and therefore a Prohibition was granted *Nisi causa, &c.*

1 Vent. 425,
473.
Ca. in Law
and Equ. 99,
399, 400,
443.
2 Vern. 361,
425, 634,
673, 674,
675, 676,
677.
5 Mod. 247.
Fitzgib. 126.
Comb. 14, 15.

D E

D E

Term. Sancti Mich.

Anno 8 W. 3. B. R. 1696.

Vide 2 Salk.
280.

Hallet ver. Byrt, & al. Trin. 8. Rot. 23.

Dorset ff. **J**ohannes Byrt nuper de Southmoreton in Com. præd. Yeoman, & Erasmus Hallet nuper de Beaminster in Com. præd. Yeoman, Attach. fuer. ad respondendum Thomæ Hallett Lanio de placito quare ipsi simul cum Thoma Hallett nuper de Southmoreton in Com. præd. Yeoman **Vi & Armis** averia ipsius Thomæ Hallett Lanii pretii viginti Librarum apud Beaminster præd. invent. & existen. absque aliqua rationabili causa ceperunt & abduxerunt per quod idem Thomas averia sua præd. penitus amisit & alia enormia ei intulerant ad grave damnum ipsius Thomæ Hallett Lanii & contra pacem Domini Regis nunc & nuper Domine Regine Mariæ Angliæ, &c. & unde idem Thomas per Willielmum Ball Attorn. suum queritur quod præd. Johannes & Eras-

mus simul cum, &c. primo Die Augusti Anno Regni Domini Regis nunc & nuper Domine Mariæ Reg. Angliæ sexto, Vi & Armis, &c. averia ipsius Thomæ Hallet Lanii, videlicet, tres Vaccas [Anglice **Cows**] & tres Juvenas [Anglice **hesters**] pretii, &c. apud Beaminster præd. invent. & existen. absque aliqua rationabili causa ceperunt & abduxerunt per quod idem Thomas averia sua præd. penitus amisit & alia enormia, &c. ad grave damnum, &c. & contra pacem, &c. unde dicit quod deteriorat. est & dampnum habet ad valentiam 40 Librarum & inde producit sectam, &c.

Et præd. Johannes Byrt & Erasmus Hallett per Egidium Clarke Attorn. suum ven. & defen. vim & injuriam, &c. & quoad venire Vi & Armis seu quicquid quod est contra pacem dicti Domini Regis nunc & nuper

per Dominum Martin Reg. nec non totam transgressionem præd. præter captionem & abductionem præd. trium Vaccarum de averis præd. in narratione præd. superius mentionat. dicunt quod ipsi in nullo sunt culpabiles modo & forma prout præd. Thomas Hallet Lanus superius inde versus eos narravit & de hoc ponunt se super patriam & præd. Thomas Hallet Lanus similiter de quodam captionem & abductionem præd. trium Vaccarum iidem Johannes & Erasmus dicunt quod præd. Thomas Hallet Lanus actionem suam præd. inde versus eos habere seu manutenere non debet quis dicunt quod Hundredum de Beaminster in Com. Dorset præd. est antiquum Hundred. quodq. diu antea præd. tempus quo supponitur captionem & abductionem Vaccarum præd. fieri scilicet decimo Die Maii Anno Reg. Dom. Jacobi secundi nuper Regis Anglia, &c. primo, Reverendus in Christo Pater ac Dominus Dominus Sethus tunc Episcopus Sarum fuit. fuit ut de feodo & jure in jure Episcopatus sui Sarum præd. de & in Hundredo præd. cum pertin. quodque idem Episcopus & omnes Prædecessores sui & omnes ill. quorum Stat. dictus Dominus Episcopus tunc habuit in Hundredo præd. a tempore cujus contrarii memoria hominum non existit habuerunt & ha-

bere consueverunt quandam Curiam hundred. de actionibus personalibus non attingenti ad quadraginta Solid. & de Replegiare* dicti. Martinus infra Hundred. præd. emergenti a tribus septimanis in tres septimanas infra Hundredum præd. Hundred. præd. coram liberis sectatoribus Curia præd. tenend. & iidem Johannes & Erasmus ulterius dicunt quod ipse idem Episcopus & omnes illi quorum status ipse tunc in eodem Hundred. habuit a tempore cujus contrarii memoria hominum non existit non fuerunt & consueverunt per se vel Seneschallum suum Hundred. præd. super querelam dicti Dominus Hundred. præd. per tempore exten. vel Seneschallo suo Hundred. præd. in ea parte facti. in prædicta Curia Hundred. præd. vel extra eandem Curiam infra Hundred. præd. ab acta personarum querentium infra Hundredum præd. insuper capi & detent. tam si quæ infra Hundred. præd. Replegiare & deliberare vel replegiari & deliberare causare & iidem Johannes & Erasmus ulterius dicunt quod præd. Sethus Episcopus Sarum de Hundred. præd. sic ut præfertur se ita exten. ipse idem Episcopus postea fuit undecimo Die Maii Anno Regni dicti Domini Jacobi III nuper Regis Anglia, &c. primo,

* That is, where a Lord of a Franchise forbiddeth his Bailiff to deliver the Distress taken by him to the Sheriff when he comes to replevy. 2 Inst. 146.

Quære, Whether one can prescribe to have a Justification de Petitum Nuisance. For it is not incident to a Court-Baron, or Hundred-Court, as the Cognizance of a Personal Action under 407.

supradict. apud Beaminster præd. in Com. præd. per quendam indentuarum suam inter ipsi Episc. ex una parte & quendam Carleton Whitlock de Medio Templo London. Ar. ex altera parte fact. cujus quidem Indenturæ unam partem sigillo ipsius Episc. sigillat. iidem Johannes & Erasmus hic in Curia proferunt cujus dat. est Die & Anno ult. supradictis præd. Episc. concessit eidem Carleton & Hæredibus & Assign. suis inter alia totum illud Hundredum de Beaminster in Com. præd. Curias Letas, Curias de Visu, Franci Plegii & omnia alia Rectas, Jurisdictiones, Franchises, privilegia, libertates, proficua, commoditates, emolumenta & hæreditament. quæcunque cum pertinent. dict. hundred. spectan. penden. five pertinent. habent. & tenent. dict. Hundred. de Beaminster præd. præfat. Carleton Whitlock, Hæred. & Assign. suis pro & duran. vitis præd. Carleton Whitlock & Katharine Uxor ejus & Andree Henley de Bromhall in Com. South'ton Bar. & pro vita eorum diutius viventis, virtute cujus quidem concessionis idem Carleton de Hundredo præd. cum pertin. fuit & adhuc est inde seisit. & sic inde seisit. existen. ante præd. tempus quo supponitur caption. & abduction. vaccar. præd. fieri præd. Thomas Hallet modo quer. & quidam Johannes Rodbart avaria videl't præd. tres vaccas in narratione præd. sup. mentionat. existen. **aberta cufusa. Th. Hallet Jun.** Yeoman apud Beaminster præd.

infra Hundred. præd. ceperunt & ea apud Beaminster præd. ac infra Hundred. præd. imparcaverunt per quod idem Thomas Hallet Junior. Yeoman ante præd. tempus quo, &c. scilicet tricesimo Die Maii, Anno Regni Dom. Willielmi & nuper Dom. Mariæ Reginæ Angliæ, &c. sexto supradict. apud Beaminster præd. infra Hundred. præd. cuidam Henrico Samwaies Gen. ad tunc & ibidem Seneschallo præd. Carleton Whitlock Curie Hundred. sui præd. questus fuit de præfat. Thoma Hallet modo quer. & præfat. Johanne Rodbart de injusta captione & detentione averiorum suorum præd. existen. vacca in narratione præd. mentionat. & ad tunc & ibidem levavit quendam querelam suam in Hundredo præd. in placito caption. & injuste detentionis averiorum suorum præd. & invenit eidem Carleton Whitlock pleg. tam de clamore suo prosequen. quam de averiis ill. retornan. si retorn. inde adjudicaretur super quo quidem Henricus Samwaies ad tunc Seneschallus Curie Hundredi præd. postea scil't eodem tricesimo Die Maii, Anno sexto suprad. apud Beaminster infra Hundred. præd. per quoddam Warrantum in scriptis sub sigillo suo quo in ea parte usus fuit sigillat. Ballivo Hundredi de Beaminster præd. necnon præfat. Erasmo Hallet direct. eis mandavit quod vaccas præd. præfat. Thomæ Hallet Junior. Yeoman sine dilatione replegiari & deliberari facerent & pon. per vad.

& favos pleg. præfat. Thomam Hallet Lanium & Johan. Rodbart quod essent ad prox. Curiam Hundredi præd. apud Beaminster infra Hundred. præd. tenen. vicesimo Die Junii tunc prox. sequen. ad responden. præfat. Thomæ Hallet Jun. Yeoman, de placito caption. & Injustæ detentionis averiorum suorum præd. quod quidem Warrantum postea & antea præd. tempus quo, &c. scil't eodem tricesimo Die Maii, Anno sexto supradict. apud Beaminster præd. in Com. præd. idem Thomas Hallet, Jun. Yeoman, præfat. Erasmo Hallet cui idem Warrantum in forma præd. direct. fuit deliberavit in forma juris exequen. virtute cujus quidem Warranti idem Erasmus & præfat. Johannes Byrt in auxilium ipsius Erasmi & ad ejus requisitionem postea scil't Die & Anno ult. supradict. apud Beaminster præd. in Com. præd. infra Hundred. præd. dicta averia præd. Thomæ Hallet Jun. Yeoman, ceperunt & abduxerunt & replegiaver. & dict. Thomæ Hallet Jun. Yeoman, ibidem secundum formam & effectum Warranti præd. deliberaver. qui eadem ex deliberatione illa ibidem adtunc recepit & adtunc & ibidem præd. Erasmus posuit per vadios & favos pleg. præd. Thomam Hallet Lanium & Johannem Rodbart quod essent ad præd. tunc prox. Curiam Hundredi præd. apud Beaminster præd. tenen. ad responden. præfat. Thomæ Hallet Jun. Yeoman, de placito captionis & injustæ detentionis averiorum

suorum præd. quæ est eadem captio & abductio Vaccarum præd. unde præd. Thomas Hallet Lanus superius se modo queritur absq; hoc quod præd. Johannes & Erasmus sunt culpabiles de captione & abductione Vaccarum præd. vel alicujus Vaccæ inde ad aliquod tempus ante confessionem. Warranti præd. seu post return. inde seu aliter vel alio modo quam ut præd. Johannes & Erasmus superius placitando allegaverunt & hoc parat. sunt verificare unde pet. judicium si præd. Thomas Hallet Lanus actionem suam præd. inde versus eos habere seu manutenere debeat, &c.

C. 2.

Et præd. Thomas Hallet Lanus quoad præd. placitum præd. Johannis & Erasmi quoad caption. & abduction. præd. trium Vaccarum superius in Bar. placitat. dicit quod ipse per aliqua per præfat. Johannem Byrt & Erasmus superius placitando allegat. ab actione sua præd. inde versus eos haben. præcludi non debet quia dicit quod placitum præd. per præd. Johannem & Erasmus modo & forma præd. superius placitat. materiaque in eodem content. minus sufficien. in lege existunt ad ipsum Thomam ab actione sua præd. versus præd. Johannem & Erasmus haben. præcluden. quodque ipse idem Thomas ad placitum illud modo & forma præd. superius placitat. necesse non habet nec per legem terræ tenetur aliquo modo respondere & hoc parat. est verificare

care unde pro defectu sufficientis
responsionis in hac parte idem
Thomas Hallet per. iudicium &
dampna sua occasione transgres-
sionis illius sibi adjudicari, &c.
& pro causa morationis in Le-
ge in hac parte juxta formam
Statuti in hujusmodi casu nuper
edit. & provis. idem Tho. Hal-

let Lanius. demonstrat & Curia
hic ostendit has causas sequen.
videl't pro eo quod placitum
præd. tendit ad generalem exit-
tum ac est duplex repugnans in-
certum & caret forma, &c.

B. S.

Joinder in Demurrer.

S. C. 2 Salk.
380.*Hallet versus Byrt.*

TRespass against Byrt and Hallet, for taking and detaining
the Plaintiff's Cattle.

Skin. Rep.
674. S. C.
Carth. 381.
S. C.

The Defendants plead Not guilty as to all, but the taking
three Cows; and as to that, they say, That the Hundred of
Beaminster is an ancient Hundred, whereof the Bishop of Salis-
bury was seized in Fee, and that he and his Predecessors have
Come out of Wain kept a Court there from three Weeks to
three Weeks, for the Trial of personal Actions under the Value
of 40s. and to prescribe to grant Replevins either by himself or
Steward in Court or out of Court, upon Complaint made to
them of the taking, and unjustly detaining, any Cattle within
the said Hundred.

That the Bishop did afterwards convey this Hundred to one
Whitlock for three Lives, by Virtue whereof he was seized.
That the Plaintiff, and one Rodbart took and impounded the
Cows within the said Hundred, being the Cows of a Stranger,
who made Complaint thereof to the Steward, and he directed
his Warrant to the Bailiffs of the Hundred, and to the said
Hallet, commanding them to recover the Cattle, by Virtue
whereof Hallet, and the other Defendant Byrt, in Auxilium ejus,
did take and deliver them to the Owner, and traversed that they
were guilty of the taking at any Time before the Warrant, or
after the Return, aliter vel alio modo.

The Plaintiff both Verdict, and Verdict for Cause, that this
Plea did amount to the general Issue; but it was argued to
maintain it.

Ca. in Law
and Equ. 25,
37, 301, 302,
306, 307.

That there was sufficient Colour to make this Plea good, for
in an Action of Trespass, Possession is a good Colour; and the
Defendant may take the Benefit of such Plea when the Sub-
stance of it is by Way of Excuse, tho' he might have pleaded
the general Issue.

Econtra

Econtra.

The Plaintiff hath declared for taking his Cattle, and the Defendant pleads, That the Property was in another, so that they are not guilty of taking his Cattle: Which Pleading might have been good in Replevin, but not in an Action of Trespass.

27 H. 8. 21. a.

And to this Purpose a Case was cited, where in Trespass for breaking his Close, and taking away 20 Load of Wood, the Defendant pleaded as to breaking the Close, That he had a Lease of it at Will from the Plaintiff himself, by Virtue whereof he entered; and as to the carrying away the Wood, That another was possessed thereof, and of the said Close, who made his Son Executor and died; and that the said Executor gave the 20 Load of Timber to the Defendant; and traversed that he took any of the Plaintiff's Wood: The Court held this to be no more than the general Issue.

9 H. 6. 11. a.

When such Pleading hath been allowed to be good, it was where the Plaintiff had not alleged any Property in the Cattle, or where the Defendant had confessed it: And therefore where the Plaintiff declared of taking quædam Averia, and the Defendant pleaded that the Property was in him, and that a Stranger took them and put them in the Plaintiff's Close by his Assent, where he found and retook them, prout ei bene licuit; that Plea was held good, for the Plaintiff had not claimed any Property in the Cattle, but only that the Defendant took quædam Averia, and doth not say ipsius Querentis, as in this Case.

Cro. Eliz. 162.
Rookwood
and Frazar.Cro. Eliz.
329.

Besides, the Defendant ought to have alleged not only a bare Possession, but a reasonable Property in this Stranger: They say, that the Plaintiff took the Cattle mentioned in the Declaration, ex isten. Averia cujusdem Thomæ Hallet Jun', so that he might only have a Possession of them.

As where Trespass was brought for taking of Boards, the Defendant pleaded, That he was possessed of them, and gave them to the Plaintiff to keep, and redeliver to the Defendant when he should be required, and he carried them to D. where the Defendant retook them. This was held an ill Plea, because the Defendant had alleged no Property in himself.

5 H. 7. 18.
Br. tit. Co-
lour, Placito
43.

But the Court did not speak to this Point; they held, that at Common Law no Replevin was made by Plaint, for that was a Remedy given by the Statute of W. 1. cap. 16, the other was by Writ of Justices in Replevin directed to the Sheriff, who thereupon either went himself, or made a Precept to his Bailiff to make Deliverance.

F. N. B. 68.
Dyer 246.
1 Inst. 145. b.

integri post quodlibet temporum præd. quo ipse jurat fuit Major Burgi præd. ut præfertur & ulterius Domino Regi certificamus quod præd. Elias Chalke Sacramenta sua præd. vili pendens & dignitatem sive utilitatem corporacionis Major. & Burgen. Burgi præd. minime curat. ipse idem Elias ministros Burgi præd. per Commune Concilium Corporacionis præd. debite electos & qui per Commune Concilium Corporacionis præd. & non aliter ab Officiis suis amoverentur arbitrarie amovit ab Officiis suis Autoritatis suæ colore absque consensu vel assensu Communis Concilii præd. scil't. Robertum Paine Commun. Clericum Corporacionis præd. Will'm Cowdry Jun. servien. ad clavum & recepit separales denariorum summas debitas & solubiles Majori & Burgenfibus Burgi præd. quas ipse idem Elias in usum suum proprium convertit & disposuit apud Wilton præd. & computum inde Majori & Burgenfibus Burgi præd. minime reddidit, scil't. unam Libram & duodecim Solidos per ipsum recept. pro redditu tolnei pontis in Harneham in Com. præd. ac debit. Corporacioni ac etiam monetam per ipsum de Corporacione præd. recept. secundum ordinem & consuetudinem ibidem usitat. minime disposuit (viz.) decem Solidos debit. Eliæ Glide Ballivo Majoris Burgi præd. ac etiam idem Elias Chalke elandestine & absque consensu Corporacionis præd. causavit quandam intrationem electionis cujusdam Ja-

cobi Horgood esse membrum Corporacionis præd. obliterari [Anglice to be struck out] a quodam libro [vocat. the esbget-Book] de & pertinen. præd. Corporacioni & manum suam propriam alie intrationi in loco intrationis sic ut præfertur obliterata & erasa scripsit & inseruit in libro præd. existen. libro in quo actus publici reipublicam Majoris & Burgenfium Burgi præd. aliquantulum tangentes memorantur & recordantur De quibus omnibus aliisque Criminibus ei object. & per ipsum existentem Burgen. Burgi præd. in Sacramenti sui præd. lesionem & Reipublicæ præd. Majoris & Burgenfium Burgi præd. detrimentum fact. & perpetrat. ipso eodem Elia Chalke in Communi Consilio [Angl. Assembly] Major. & Burgenfium Burgi præd. plenius audit. & super probation. examination. & matur. consideration. inde iidem Major & Burgen. Burgi præd. in Communi Consilio præd. apud Guildhall Burgi præd. 28 Die Augusti. An. Dom. Millesimo sexcentesimo nonagesimo quinto Assemblat. ordinaverunt eundem Eliam Chalke ab officio & Loco unius Burgen. Burgi præd. Amoberi [Anglice Disfranchised] & per eundem ordinem fuit amotus inde & redditus incapax aliquid amplius agendi ut membrum ejusdem Corporacionis hisque de causis eundem Eliam Chalke in locum & officium unius Burgenfium Burgi præd. restituere non possumus.

W. Sharpe, Major.

Rex

Rex ver. Major. & Burgen. Wilton.

MAndamus to restore one Elias Chalke to the Place of a Burgess in Wilton; the Return whereof was, That Wilton is an antient Borough wherein there was a Custom, That the Mayor and Burgesses should be a Body Incorporate, and that they might displace any Burgess who should act any Thing against his Oath, or against the Interest of the Borough, upon hearing the Offence and Proof of his Crime.

Vide ante 10,
11. post 314,
404, 452.
6 Mod. 18.

That Elias Chalke was chosen a Burgess there in May, Anno 29 Car. 2. and then took an Oath to be faithful and true to the Corporation, and to endeavour the Advancement thereof.

That he was afterwards chosen Mayor of the said Corporation, and took an Oath, That the Rents thereof, as far as he could, should be employed for the Profit of the said Corporation; and that in all Matters of Moment he would consult his Brethren, and conclude on nothing without their Consent. But that he not regarding his Oath, and neglecting the Profit of the Corporation, did arbitrarily discharge Robert Paine and others from their Offices there, and that they ought not to be removed but by the Common-Council. That he received several Sums of Money due to the Corporation, and converted the same to his own Use, without giving any Account thereof. That he hath made undue Entries of Elections of Members of the Corporation in their Ledger-Book; and sets forth all these Matters in particular. For which, and other Crimes, he being heard in Common-Council, and it being proved upon him, the Mayor and Burgesses of the said Borough being assembled in Common-Council, did disfranchise him, and made him incapable to hold that Office of Burgess any longer; for which Reasons they could not restore him.

Those who argued against this Return, said, 1. That it was insufficient and illegal: For if the Mayor and Burgesses have an Authority to disfranchise, and this general Custom, as returned, shall extend to such Things which they may lawfully do; yet they have not well pursued it, because it doth not appear that he was summoned to answer these Offences which are laid to his Charge, or that he had due Notice to defend himself; for a Man may be heard as 'tis alledged in the Return, but not in his own Defence.

U u u

There.

Therefore a Summons is necessary in all such Cases, and not generally, but to answer those particular Matters.

Thus it is, if the Party leaves the Corporation, and inhabits elsewhere: In such Case a general Summons is not sufficient, it must specify the Offence of which he is accused; and therefore a general Return of a Summons, (viz.) *Quod licet sepius requisitus fuit, hath been held insufficient to turn a Man out of his Freehold.*

Rex versus
Glyde.

The End of a Summons is to bring the Party to give his Answer by the ordinary Process of the Court, and likewise to give him Notice of his Accusation, and therefore it ought to be particular: So that tho' it is returned, that he was fully heard de omnibus Criminibus; yet without a Summons he may not be prepared to answer, or to make a full Defence.

11 Rep. 99.

Agreeable to this is the Resolution in James Baggs's Case, That notwithstanding a Corporation hath an Authority to remove either by Charter or Prescription, and have a just Cause so to do; yet if it appear by the Return of a Mandamus, that they have proceeded against the Party without hearing him to what was objected, or that he was not reasonably warned, such a Disfranchisement is void, and shall not bind the Party.

Style 151,
446, 452.

2. The Return is uncertain; for it is, That he was *Plenus audit. de omnibus aliis Criminibus, &c.* and that upon Proof thereof he was disfranchised, which is not sufficient to justify it, because it is not positively set forth that he was heard concerning those other Crimes laid to his Charge, or before whom he was heard. It is true, it is alleged, That he was heard in *Communii Concilio*, who might be assembled in the Council-house not to confide but to hear; it should have been, That it was heard *apud Commune Concilium, &c.* So it was held in the Case of the Mayor of Gloucester, who returned, That he called to him thirty of the Council in *Domo Concilii assembleat*, and did remove the Party: This was held insufficient, because it did not appear that it was *apud Commune Concilium*.

3 Bull. 189.
Poph. 133.
1 Roll. Rep.
409.

Sid. 313.

Then they return, That the Crimes were proved upon him, but do not say by what Proof, or what is was upon Oath. Now Proof without swearing in what Manner, must be such which is allowed in Common Law, and that is by Jury, which was not in this Case.

3. It doth not appear but that those other Crimes may be such for which they could not justify this Disfranchisement. They should

should have returned, That he was required to make his Defence to particular Crimes objected against him; for in all Returns of this Nature there must be a precise Certainty, and the Court will intend nothing but what is sufficiently alleged.

Besides, the Crimes which are expressed, are not so certainly set forth that this Court may judge of the Cause of this Proceeding against the Party; for it is said, that he removed the Servants of the Corporation from their Offices, who ought not to be removed but by the Common-Council. Now it doth not appear what Interest those Persons had in their Offices, or that they were removed by him against their Consent, for it may be that they surrendered willingly.

4. They return, That an Order was made to disfranchise him, and that by Virtue of that Order he was made incapable of acting as a Member of the Corporation. This is also insufficient, because they cannot remove any one by Virtue of an Order; it must be by a corporate Act under the Common Seal.

5. As to his receiving Money due to the Corporation, and converting it to his own Use without giving any Account thereof, they do not say, that they required him to give an Account, and that he refused.

Lastly, as to his striking out an Election of a Member in the Ledger-Book, and signing another Entry instead of that struck out; this doth not appear to be any Crime in him, for they do not say, that such was an undue Entry; he might strike it out with an Intent to write another who was lawfully chosen. It is not objected against him as an Abuse or Falsity; for which Reasons a peremptory Mandamus was prayed.

Eccontra.

It was argued on the other Side, and the Court inclined, that there need not be any Summons to answer particular Matters; neither doth Bagge's Case say that the Party should be summoned: It is sufficient if he hath been heard, which may be done, and was in this Case without any Summons, and if heard, the Court will intend that it was in his Defence; so that there is no need of a Summons at all, because the Intent of it is answered. But this was not the Grounds of the peremptory Mandamus, which was granted for the other Reasons above-mentioned.

Placita

Raym. 153,
365, 432.
2 Salk. 432.
1 Sid. 209.
Fitzgib. 123,
124.
1 Keb. 716.
1 Show. 282.
Ca. in Law
and Equ. 101,
102.

Comb. 41,
42, 279.
324, 422.
Mo. 548.

Ca. in Law
and Equ. 580.
2 Salk. 428,
435.
Palm. 453.
Styles 51,
446, 452.
3 Bull. 189.
2 Keb. 489.

Placita coram Domino Rege apud Westm. de Termino Sancti Hillarii, Anno Regni Domini Will'i Tertii Regis Angliæ, &c. Sexto. Rot. 729.

Wigorn. ff. **M**emorandum, quod die Mercurii prox. post Octab. S. Hillarii isto eodem Termino coram Domino Rege apud Westm. venit Georgius Leigh per Thomam Callow. Attorn. suum & protulit hic in Curia dicti Domini Regis tunc ibid. quandam Billam suam versus Samuelem Brace in Custodia Mar. &c. de Placito Transgressionis & ejectionis firmæ & sunt pleg. de prof. scilicet Johannes Doe & Richardus Roe quæ quidem Billa sequitur in hac verba.

ff. Georgius Leigh queritur de Samuele Brace in Custodia Mar. Marefcal. Domini Regis, coram ipso Rege existen. pro eo videlicet quod cum quidam Johannes Cookes primo die Octob. Anno Regni Domini Will'i nunc Regis & Domine Mariæ nuper Reginæ Angliæ, &c. Sexto, apud Paroch. de Bromsgrove in Com. præd. dimississet, concessisset, & ad firmam tradidisset præfat. Georgio unum Messuagium trigint. acras Terræ decem acras Prati & viginti acras Pasturæ, cum pertin. scituat. jacen. & existen. in Paroch. de Bromsgrove præd. in Com. præd. haben. & tenen. ten'ta præd. cum pertin. eidem Georgio & assign. suis a Festo die Sancti Michaelis Arch'i tunc ult. præterit. usque plenum finem & Terminum Sep-

tem Annor. extunc proxime sequen. & plenar. complen. & finien virtute cujus quidem dimissionis idem Georgius in ten'ta præd. cum pertin. intravit & fuit inde possessionat. quosque præd. Samuel postea, scilicet, eodem primo die Octobris Anno Sexto supradict. vi & armis in ten'ta præd. cum pertin. in & super Possessionem ipsius Georgii inde intravit, & ipsum Georgium a firma sua præd. Termino suo præd. inde nondum finito ejecit, expulit, & amovit ipsumque Georgium a possessione sua præd. inde extratenuit & adhuc extratenet, & alia enormia eidem Georgium ad tunc & ibidem intulit contra pacem dictor. Domini Regis nunc & nuper Domine Reginæ & ad dampnum ipsius Georgii decem librarum, & inde producit sectam, &c.

Et præd. Samuel Brace per Johannem Hancocks Attorn. suum, venit & defen. vim & injuriam quando, &c. & dicit quod ipse non est inde Culpabilis & de hoc ponit se super patriam & præd. Georgius similiter, &c. Ideo ven. inde Jur. coram Domino Rege apud Westm. die Martis prox. post Octab. Purificationis beatæ Mariæ & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies dat. est partibus præd. ibidem, &c.

Postea

Postea continuatur inde processus inter partes præd. de Placito præd. per jur. posit. inde inter eas in respectu coram Domino Rege apud Westm. usque diem Mercurij prox. post quinden. Pasche extunc prox. sequen. nisi Justiciar. Dom. Regis ad Assisas in Com. præd. capien. prius die Sabbati secundo die Martij apud Wigorn. in Com. præd. per formam statuti, &c. ven. pro defectu Jur. &c. ad quem diem coram Dom. Rege apud Westm. venit præd. Georgius per Attorn. suum præd. & præfat. Justiciar. coram quibus, &c. mis. hic record. suum coram eis habit. in hæc verba.

¶ Postea die & loco infracentent. coram Egidio Eyre milite, un. Justiciar. Domini Regis ad Placita coram ipso Rege tenen. assign. & Thoma Breton Ar. eidem Egidio Eyre & Willielmo Gregory mil. al. Justiciar. dicti Dom. Regis ad Placita coram ipso Rege tenen. assign. Justiciar. ipsius Dom. Regis ad Assisas in Com. Wigorn. capien. assign. per formam statuti, &c. hac vice allociat. præsentia præd. Will'i Gregory non expectat. virtute Brevis Dom. Regis de si non omnes, &c. ven. tam infranominat. Georgius Leigh quam infrascript. Samuel Brace per Attorn. suos infracentent. & Jur. Juratæ unde infra fit mentio exact. ven. qui ad veritatem de infracentent. dicen. electi triati & jurati dicunt super sacrament. suum quod quidam Walterus Brace seissitus fuit de ten'tis in Narratione infrascript.

mentionat. in Domin. suo ut de feodo & sic inde se'it. existen. præd. Walterus Brace ante præd. tempus quo, &c. scilicet, 25 die Julij, Anno Regni Dom. Jacobi Primi nuper Regis Angliæ, &c. 20, per quandam Chartam suam Sigillo ipsius Walteri signat. & juratæ præd. in evidentiam ostens. cujus dat. est eisdem Die & Anno feoffavit quosdam Thomam Wilks & Thomam Flavell de & in ten'tis præd. cum pertin. haben. & tenen. eisdem Thomæ & Thomæ & Hæredibus suis ad usus in præd. Charta specificat. tenor cujus quidem Chartæ sequitur in hæc verba.

To all Christian People to whom this present Writing shall come, Walter Brace of Forkbury, in the Parish of Bromsgrove, in the County of Wigorn, Peoman, sendeth Greeting. Know ye, that I the said Walter Brace, for the natural Love and Affection which I bear unto my Son Thomas Brace, and for divers other Considerations me especially moving, have given, granted, enfeoffed, and confirmed, and by these Presents do give, grant, enfeoff, and confirm, unto Thomas Wilkes, of Forkbury aforesaid, Peoman, and unto Thomas Flavell of Bromsgrove aforesaid, Clerk, their Heirs and Assigns, all that Dwelling-house or Tenement, with the Appurtenances, which I the said Walter Brace purchased of Stephen Dipple of Bromsgrove aforesaid, and is situate in the High Street of

of Bromsgrove, between the Land of Edward Seabright, Esq; and the Land of Gilbert Butler, Gent. and now in the Tenure of Occupation of Walter Rose, and also one other House or Cottage, with the Appurtenances, situate and being in Fork-bury aforesaid, wherein Gilbert Westley now dwelleth, together with the Close wherein the said Cottage standeth, containing by Estimation one Acre and an half, or thereabouts, be the same more or less; one other Close of Pasture called by the Name of Whern's Close, containing by Estimation three Acres or thereabouts; one other Close of Pasture called by the Name of Woodfell, containing by Estimation five Acres or thereabouts; two other Closes called the Slide Crofts, containing by Estimation six Acres or thereabouts; one Day's Bowch of Meadow Ground lying in Long Meadow, next unto the Gate there; and two fleeting Acres lying in Broad Meadow: With all Ways, Waters, Woods, Underwoods, Commons, Ponds, Commodities, Advantages, and Perquisites whatsoever unto the said Premises, and every Part and Parts thereof belonging, or in any wise appertaining; all which said Premises are situate, lying and being in the said Parish of Bromsgrove, and County of Wigorn: To have and to hold the said Houses or Tenements, Lands, and all and singular other the Premises

with the Appurtenances, and every Part thereof, to the said Thomas Wilkes and Thomas Flavell, their Heirs and Assigns, to the Uses, Intents and Behoofs herein after by these Presents mentioned and declared, and to no other Use, Intent or Purpose: That is to say, to the Use and Behoof of me the said Walter Brace, for and during my natural Life; and after the Decease of me the said Walter Brace, to the Use and Behoof of the aforesaid Thomas Brace my Son, and his Heirs for ever: And for Default of Issue of the Body of the said Brace, then to the Use and Behoof of the Right Heirs of me the said Walter Brace for ever, to be holden of the Chief Lord or Lords of the Fee or Fees of the Premises by the Rents and Services thereof, first due and of Right accustomed: And I hereby the said Walter Brace and my Heirs, the said Houses or Tenements, Lands, and all and singular other the Premises, with the Appurtenances, and every Part and Parcel thereof, unto the said Thomas Wilkes and Thomas Flavell, and their Heirs, shall and will warrant and for ever defend by these Presents. In Witness whereof, I the said Walter Brace unto this my present Writing indented, have set my Hand and Seal the 23th Day of July, in the Year of the Reign of our Sovereign Lord King James, by the Grace of God, of England, France and

Ire-

Ireland, King, Defender of the Faith, &c. the Twentieth, and of Scotland the fifty-fifth, Annoque Domini 1627.

Virtute cujus necnon vigore actus Parliamenti de usibus in possessione, transferen. edit. & provis. idem Walterus seiscitus fuit de premissis in eadem Charta mentionat. existen. premissa præd. in narratione præd. specificat. ut de libero ten'to suo pro termino vitæ sue remanere inde præfat. Tho. Brace spectan. prout lex postulat & iidem Juratores ulterius super sacrum suum dicunt quod præd. Walterus Brace postea & ante præd. tempus quo, &c. obiit, & quod præd. Thomas Brace, filius ipsius Walteri intrauit in ten'ta in narratione infrascript. mentionat. & fuit inde seiscitus prout lex postulat & quod ipse præd. Thomas Brace sic inde se'it. existen. debito modo & forma fecit ultimam voluntatem suam in scriptis decimo sexto Die Aprilis, Anno Regni Caroli secundi, nuper Regis Angliæ, &c. Tricesimo tertio, quæ quidem voluntas sequitur in hæc verba.

In the Name of God, Amen. The sixteenth Day of April, in the twenty-third Year of the Reign of our Sovereign Lord Charles II. by the Grace of God, of England, Scotland, France, and Ireland, King, Defender of the Faith, &c. Annoque Domini 1681. I Thomas Brace of Forkbury, in the Parish of Bromsgrove, in the County of Wigorn', Peoman, being weak of Body, but of sound and

perfect Memory and Understanding, Thanks be to God; calling to Mind the uncertain State of this Life, and being desirous to settle Things in Order for the leaving the World, I having lived in the Enjoyment thereof till a very considerable Age, do make this my last Will and Testament in Manner following, revoking by these Presents all and every other Testament or Testaments, Will and Wills, heretofore by me made either by Word or Writing, and this to be taken only for my last Will and Testament. First, I bequeath my Soul unto God my Creator, and to Jesus Christ my Redeemer; and my Body to the Earth from whence it was taken, to be decently buried in such Christian Manner as to my Executor herein after named shall be thought most convenient, there to rest until my Soul and Body shall meet again, and be joined together at the Resurrection. And touching such temporal Estate as God hath been pleased to bestow upon me, I do order, give, and bequeath the same in Manner following:

Imprimis, I do hereby give and devise unto my Son Samuel Brace, during the Term of his natural Life, eight Pounds a-year of lawful Money of England, to be paid him Quarterly, from the Time of my Decease, by my Executor herein after mentioned, he my

said Son Samuel permitting and suffering William Fowkes, and Jonathan Wall, their Executors, Administrators and Assigns, peaceably and quietly to hold and enjoy the Lands and Tenements, and Premises to them by me severally leased, at and under the Rents and Covenants specified in their several Leases; but if he molest or hinder the said Jonathan Wall and William Fowkes of their quiet enjoying the Premises, or any Part thereof to them by me devised, then my Will is, That my said Son Samuel have four Pounds a Year only during his Life, paid him Quarterly by my Executor, in full Discharge and Satisfaction of the said eight Pounds a Year. Item, I give and bequeath unto my Daughter Elizabeth Brace three hundred Pounds of like lawful Money of England, to be paid by my Executor as followeth, (viz.) two hundred Pounds within a Year, and one hundred Pounds more, the remaining Part of the said three hundred Pounds, within two Years after my Decease if she so long live, or bear any Issue of her Body, with all my Goods that shall be in my House at Whernes-Ash at my Decease. Item, I give to my Grandson Henry Cooks, during his natural Life, all that my Messuage or Tenement in Forkbury, with two Acres of Land to the same belonging, in the Possession of one William Perkes, and four more Acres of Land to the same

adjoining, in the Possession of one William Oxford, the Rents and Profits of the said Messuage, and several Parcels of Land, to be received and enjoyed by my Executor, till my said Grandchild Wall attain to the Age of 21 Years, for the Maintenance and Education of my said Grandchild. Item, I give and devise to my Grandchildren Mary and Hannah Cooks, all those my two Closets of Land in Casill adjoining to the Common Field there, called Intall-Field, containing by Estimation about four Acres, and three several Parcels of Land in Intall-Field, containing by Estimation three Acres. And lastly, I give and devise unto John Cooks, my Son-in-Law, whom I make Executor of this my Will, and to his Heirs on the Body of my Daughter Rebecca begotten, or to be begotten, all my Estate, Lands, Tenements, and Houses whatsoever in Forkbury and Casill, in the said Parish of Bromsgrove and County of Worcester, and not heresh before devised, and the Reversion of the said Messuage and Lands heresh before bequeathed to my said Grandchild Henry Cooks from and after his Decease, paying the Legacies and Annuities in this my Will comprised, &c.

In Et iidem Juratores ulterius super sacrum suum dicunt quod præd. Thomas Brace postea obiit de ten'tis præd. cum pert'in. seisset ut præfertur & quod tenementa præd.

præd. cum pertin. in narratione præd. specificat. & ten'ta præd. in voluntate præd. prius recitat. & per eandem express. fore devifat. præfat. Johanni Cooks in possessione sunt eadem ten'ta cum pertin. & non alia nec diversa & quod præd. Johannes Cooks post mortem ipsius Thomæ Brace in ten'ta præd. existenten'ta in questione intravit colore voluntatis præd. & fuit. inde seifitus prout lex postulat & iidem Juratores ulterius super sacrum suum dicunt quod præd. Johannes Cooks post mortem præfat. Thomæ Brace tam omnes & singulas legationes & annuitates in eadem voluntate mentionatas & comprifatas ad talia tempora & modo & forma prout in eadem voluntate direct. est quam omnia debita iusta & expensas funerales præfat. Thomæ Brace solvit secundum veram intention. dictæ voluntatis & Juratores præd. super sacrum suum præd. ulterius dicunt quod infranominat. Samuel Brace modo defenden. est filius & hæres de corpore præd. Tho. Brace & quod idem Samuel Brace post mortem præfat. Thomæ patris sui in ten'ta præd. cum pertin. intravit & fuit inde seifitus prout lex postulat & præd. Joh'es Cooks postea & ante præd. tempus quo, &c. scilicet infrascript. primo die Octobris, Anno Regni Domini Willielmi nunc Regis Angliæ & nuper Domine Mariæ Reginæ Angliæ, &c. sexto, apud Parochiam de Bromsgrove infrascript. in Com. præd. in tene-

menta præd. cum pertin. intravit & adtunc & ibidem demississet concessisset & ad firmam tradidisset præfat. Georgio ten'ta præd. cum pertinen. haben. & tenen. ten'ta præd. cum pertin. eidem Georgio & Assign. suis a Festo Die Sancti Michaelis Archangeli tunc ult. præterit. usque plenum finem & Terminum septem Annorum extunc prox. sequen. & plenat. complen. & finien. virtute cujus quidem dimissionis idem Georgius in ten'ta præd. cum pertin. intravit & fuit inde possessionat. quousque præd. Samuel Defenden. postea scil't eodem primo Die Octobris, Anno sexto supradicto in ten'ta præd. cum pertin. in & super possession. ipsius Georgii inde intravit & ipsum Georgium a firma sua præd. prædicto termino suo nondum finito ejecit expulit & amovit ipsumque Georgium de possessione sua præd. inde extratenuit & adhuc extratenet sed utrum super totam materiam præd. per Juratores præd. in forma præd. compert. præd. Samuel Brace modo defenden. est culpabilis de transgression. & ejectione firmæ infrascript. modo & forma prout præd. Georgius interius versus eum queritur necne Juratores præd. penitus ignorant. & inde pet. advisamentum & considerationem Curie, &c. & si super totam materiam præd. per Juratores præd. in forma præd. compert. videbitur Curie Domini Regis hic quod præd. Samuel Brace modo defen. est culpabilis de transgression. & ejectione

ejectione firmæ infrascript. modo & forma prout præd. Georgius interius versus cum queritur tunc iidem Juratores ulterius super factum suum dicunt quod præd. Samuel Brace est Culpabilis de transgressionē & ejectione infrascript. modo & forma prout præd. Georgius Leigh interius versus cum queritur & assidunt damna ipsius Georgii Leigh occasione infrascript. ultra mis. & Custag. sua per ipsum circa sectam suam in hac parte appo'it ad sex denar. & pro mis. & Custag. iis il. ad quadraginta solid. sed si super totam materiam præd. per Juratores præd. in forma præd. compert. videbitur Curia hic quod præd. Samuel Brace modo defenden. non est Culpabilis de

transgressionē & ejectione firmæ infrascript. modo & forma prout præd. Georgius interius versus cum queritur tunc iidem Jur. ulterius dicunt super fact. suum præd. quod præd. Samuel Brace non est Culpabilis de transgr. & ejectione in Narratione infrascript. specificat. prout præd. Samuel Brace interius pro se Placitando allegavit & quia Curia Domini Regis nunc hic de iudicio suo de & super præmissis redd. nondum advisatur Dies inde datus est partibus præd. coram Domino Rege apud Westm. usque diem prox. post de iudicio suo de & super præmissis il. inde audien. eo quod Curia dicti Domini Regis nunc hic inde nondum, &c.

Leigh versus Brace.

UPON a special Verdict in Ejectment, the Case upon the Pleading was thus :

ff. Walter Brace being seized of the Lands in Question, did on the 25th Day of July, Anno 1622, make a Feoffment thereof in Fee to Thomas Wilkes and Thomas Flavell, and their Heirs, to the Use of himself for Life, and after his Decease to the Use of his Son Thomas Brace and his Heirs for ever; and for Default of Issue of the Body of the said Thomas Brace, then to the Use and Behoof of the right Heirs of the Feoffor for ever.

That Walter Brace afterwards died so seized, and Thomas his Son entered upon the Lands, who on the Sixteenth Day of April 1681, made his Will, and among other Things, devised the same to his Son-in-Law John Cookes and his Heirs, on the Body of Rebecca his then Wife begotten, or to be begotten, paying his Debts and Legacies. That the said Thomas Brace died seized of the said Lands; and after his Death John Cookes entered by Virtue of the said Devise. That Samuel Brace the Defendant is Son and Heir of the said Thomas Brace, and that the said Samuel, after the Death of his Father, did likewise enter upon these

these Lands, That John Cookes afterwards entered, and made a Lease to the Plaintiff for seven Years, by Virtue whereof he entered and was possessed until Samuel Brace ejected him; and so make a general Conclusion.

The single Question was, What Estate Thomas Brace took by this Feoffment?

It was argued, That he had a Fee-Simple, for such an Estate was expressly limited to him; and if the Deed had gone no further, it must be an Estate in Fee, and no otherwise.

But that which makes the Doubt, are the Words which immediately follow, (viz.) And for Default of Issue of the Body of the said Thomas Brace, then to the Grantor and his Heirs. It is true, these Words might create an Estate-Tail in a Will, and alter an express Limitation made of the Estate before; and the Reason is, because a Man in extremis est Inops Consilii: But it is otherwise in a Feoffment, which is supposed to be made upon Deliberation, and with Advice of Counsel.

And therefore it was resolved in the Case of Dutton and Enggram, That where the Testator devised Lands to his Wife for Life, and after her Decease to John his eldest Son and his Heirs, upon Condition that he did grant an yearly Rent to Stephen and his Heirs; and if John died without Heirs of his Body, then to Stephen and the Heirs of his Body. This was held to be an Estate-Tail in John, tho' it was objected, that he must have an Estate in Fee, otherwise he could not grant the Rent in Fee.

Now this was in the Case of a Will: But there is a wide Difference between Constructions of Wills and Deeds, for the latter are always taken very strictly against the Grantor, and therein the first Intention shall always take Place; for the Law will not allow any Implication which can or may be made upon a subsequent Clause in a Deed, to alter any express Estate therein limited before.

As for Instance: It hath been ruled, That where a Copyholder in Fee surrendered to the Use of Frances and John Reeve, and the Survivor; and for want of Issue of the Body of John, lawfully to be begotten, then to remain over; with a Memorandum, That the Surrender was not to be in Force till after the Death of the Surrenderor. Now if this Memorandum should be allowed to be good, it would have made the whole Surrender void, because it had been to commence at a Day to come; therefore it was held, That the Surrender being perfect in the Beginning, should not be avoided by this subsequent Clause, but that John should have an Estate for Life only, which should not be enlarged by Implication by a subsequent Clause, either in a Surrender

1 Cro. 427.
1 Roll. Abr.
842, 938.

Cro. Car. 367.
2 Roll. Abr.
61.
Jones 342.

Sunderland is Controversy, where the Party might have Com-
menced to issue him.

1 Inst. 21. a.
Hob. 172.
Cro. Jac. 401.
Comber. 330.
Cro. Car. 230,
245.

It is true, my Lord Coke in his Comment upon Littleton, tells
us, That if Lands are given to B. and his Heirs, Habendum to
him and his Heirs if he hath Heirs of his Body, and if he
die without Heirs of his Body, that the Land shall revert to the
Donor. This is an Estate-Tail, for the Habendum shall be con-
sidered upon the whole Deed to be a Declaration, what Heirs
were meant in the Premises.

But this was all in one Sentence, and for that Reason the
Estate in Fee was never made perfect and absolute: It is all but
one Limitation, neither did it stand with any Implication, as in
the Case at Bar; and therefore it can be no Authority to prove
that to be an Estate-Tail.

19 H. 6. 74. b.
Plowd. 541.

Neither is the Year-Book, 19 H. 6. an Authority to this Pur-
pose; where it is held, That if a Feoffment is made to a Man
and his Heirs, and if it should happen that he die without Heirs
of his Body, the Remainder over, that the Law will intend it to
be an Estate-Tail. It is true, the Book is so, but it doth not
appear that it was the Judgment of the Court, but only asserted
by Counsel arguendo.

But in the principal Case, the Estate was once made absolute;
which being done, the Grantor had executed his Power, and
could never make any further Limitation, especially it being in
the Case of a Deed.

Econtra.

But on the other Side it was said, That this is not an entire
Sentence, but it is complicated with the whole Clause.

That there are many Forms of Words to create an Estate-
Tail; and though it is generally true, that the Words Heirs of
the Body are requisite in a Gift in Tail, yet general Words which
are equivalent will create the like Estate. As for Instance, Lands
are given to a Man & Hereditibus de Carne sua; for the makers
of the Statute de Donis, &c. did not intend to enumerate all the
forms of Estates-Tail.

1 Inst. 20. b.
13 Edw. viz.
W. 2. c. 1.

Cro. Jac. 416.
Cro. Car. 230,
245.
Cro. El. 248.
a Ventr. 313.

It is very true, such Estates must be limited by express Words,
and it is sufficient if by Words which are of the same Import
and Signification; therefore Littleton tells us, what an Estate-
Tail is, but doth not shew what Words are necessary to create
such an Estate.

Sec. 14.

Now the subsequent Words in this Case do certainly make
an Estate-Tail in the Feoffee, for they shew what Issue was in-
tended to inherit, viz. Issue of the Body of the Feoffee; and
this

this will be sufficient to abridge the precedent Estate in Fee; and if these Words should not be taken in this Sense, then they are vain and to no Purpose.

Thus my Lord Rolle, in abridging 27 Assisar, tells us, If Lands are given to a Man and his Heirs, Habendum to him and his Heirs, if he shall have any Heirs de Carne sua, and if not, that it shall revert to the Donor; though the first Word import a Fee, yet the Whole make an Estate-Tail.

Agreeable to the Case at Bar is that of Walts and Wastfeild, where Lands were given to a Man and his Heirs; and if it happened that he died without Heirs of his Body, Remainder over: This is an Estate-Tail, for the Limitation of the Remainder over shows what Heirs were intended.

But Beak's Case is in Point; that was in a Conveyance by way of Feoffment, as this is, (viz.) To the first Son who shall have Issue, and to his Heirs; and for Default of such Issue, the Remainder over. This was held an Estate-Tail.

Curia. The Intention of the Feoffor is plain, That an Estate in Fee should not pass to his Son, for the subsequent Words shew, that he intended no absolute Estate should vest in him; it is no more than if a Gift had been made to a Man and his Heirs, (viz.) to the Heirs of his Body. So Judgment given for the Defendant.

Breedon versus Gill, qui tam, &c.

Anglia ff. **M**emorandum. quod die Martis in Crastino Animarum isto eodem Termino coram Domino Rege apud Westm. ven. hic in Curia Rob'tus Breedon in propria Persona sua & dat. Curia hic intelligi & informari quod cum per leges & statuta hujus regni Anglia quilibet exitus junct. in aliqua causa dependen. in aliqua Curia Regis infra hoc regn. coram aliquo Judice vel aliquibus Judicibus per Testimon. testium viva voce in hujusmodi Curia producen. ac non per lectionem nota-

rum five minutar. in scriptis continen. testimonium alicujus testis vel aliquorum testium in eadem five aliqua al. Curia ante tempus triacon. talis exitus per aliquem clericum alicujus Curia capt. triari & terminari debent. Cumque quedam informatio nuper, scil't. decimo Octavo die Januarii, Anno Regni dicti Domini Regis nunc Septimo, secundum formam statuti in hujusmodi casu edit. & provis. exhibita fuit apud London. in Parochia coram Capitali Commissionar. & gubernatore reventionum dicti Domini

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27 Affic.
Placito 15.
1 Roll. Abr.
388.
2 Salk. 621.

1 Roll. Abr.
839.

Lit. Rep. 344.

2 Salk. 555.

Domini Regis de le Excise secundum formam statuti in huiusmodi casu nuper editi & Provisi appunctuat. per quendam Thomam Gill gen. qui tam pro Domino Rege quam pro seipso & pauperibus Parochie Sancti Martini in campis in Com. Mid. sequitur versus eundem Robertum Breedon ostenden. quod dictus Rob'tus Breedon communis pandoxator inhabitans & custodien. Commune cervisiar. [Anglice *Common Brewhouse*] pro pandoxan. cervisiam lupulat. & cervisiam illupulat. infra Limites & Jurisdictiones general. Officii de le Excise situat. in Broadstreet, London. videlicet. in Parochia Sancti Martini in Campis præd. absque prius dand. notitiam deinde apud dictum Officium de le Excise sive Commissionariis aut gubernatoribus præd. aut aliquibus eorum infra Limites & Jurisdictiones ejusdem in & circa 16 diem Decembris tunc ult. præterit utebatur [Anglice *to make use of*] & Custodiebat privatam & concealatum Repositorium [Anglice *a private and concealed Storehouse*] sive Roomam [Anglice *Room*] pro locan. [Anglice *laying*] cervisiam Lupulat. [Anglice *Beer*] & cervisiam illupulat. [Anglice *Ale*] aut liquorum cervisice incoctum [Anglice *Morts*] in Testis [Anglice *Casks*] eodem non existen. tal. qual. fuit aperte cognit. detect. [Anglice *discovered*] sive usum fuit [Anglice *made use of*] in communi usual. Cervisiano suo [Anglice *in his Brewhouse*] ad dampnum

& præjudicium dicti Dom. Regis in reventione sua de le Excise quod fuit contra formam statuti in huiusmodi casu editi & provis. atque igitur Judicium dictor. Commissionar. & gubernator. per informationem ill. petebat prout in & per Leges Excise devisebatur & appunctuabatur ad quam quidem informationem coram præd. Commissionar. & gubernatoribus dictus Robertus Breedon postea. scilicet. Tertio die Martii. Anno Regni dicti Domini Regis nunc Octavo ibidem comperuit & Placitavit quod ipse non fuit Culpabilis de offensa. in dicta informatione content. & exit. superinde ibid. junct. fuit taliterque superinde coram dictis Commissionar. & gubernatoribus revention. dicti Dom. Regis de le Excise processum fuit quod postea. scilicet. eodem Tertio die Martii. Anno Octavo supradicto. ibidem præd. Commissionar. ac Gubernator. adjudicaverunt eundem Robertum fore Culpabil. de Præmissis ei par information. præd. superius object. a quo quidem Judicio & determinatione ac pro relevio haberi. in præmissis præd. Robertus Breedon postea. scilicet. 24^o die Aprilis. Anno Regni dicti Domini Regis nunc Octavo. secundum formam statuti in huiusmodi casu nuper editi. & provis. appellavit ad Commissionar. de le Appales per leges & statuta hujus Regni Anglæ in huiusmodi casu appunctuat. & præd. Thomas Gill qui tam pro Domino Rege quam pro seipso & pauperibus Parochie Sancti Martini in Campis præd.

30 die Octobris Anno 8^o supra dicto, apud Westm. in Com. Mid. coram Bodington Lock & Chaffoner Armigeris Comissionar. de le Appeales præd. debito modo ad hoc secundum formam statuti in huiusmodi causa edit. & provis. appunctuat. ad proban. præd. Robertum Culpa bilem de Præmissis in præd. informatione specificat. in evidentiis obtulit quasdam Notas [Anglice Notes] & Minutas [Anglice Minutes] Testimonii [Anglice in the Evidence] per Thomam Everard, Johannem Booth, & Henricum Cateburt tunc & adhuc in plena vita existen. & residen. apud Civitat. London præd. testes coram præd. capitali Comissionar. & Gubernatoribus Revention. super trinationem præd. exitus coram iis dat. tunc per quendam Edwardum Noel Ar. Clericum præd. Capital. Comissionar. absque aliqua legali auctoritate in scriptis capt. Ac licet idem Robertus Breedon ad tunc & ibidem præd. Comissionar. de le Appeales allegavit & objecit quod præd. Note per leges in evidentiis perlegi non debent ac petiit quod præd. Tho-

mas Everard, Johannes Booth, & Henricus Cateburt tunc & adhuc ut præfertur in plena vita existen. super sacra sua coram iisdem Comissionar. de le Appeales ad tunc adjudicaver. quod dictæ Note [Anglice Notes] sive Minutæ [Anglice Minutes] sic ut præfertur per eundem Edwardum Noell absque aliqua legali auctoritate capt. lect. forent. in evidentiis contra leges & statut. huius regni Angliæ ac præd. Thomas Gill iudicium sic ut præfertur per Capital. Comissionar. & Gubernator. revention. dicti Domini Regis de le Excise dat. super evidentiæ præd. totis suis viribus procurare confirmari conatus & indies Machinatus est in dicti Domini Regis nunc contemptum & ipsius Roberti Breedon damn. præjudicium & gravamen manifestum & contra legem & cons. huius Regni Angliæ & hoc parat. est verificat. unde idem Robertus Breedon Curie dicti Dom. Regis de prohibitione præfat. Comissionar. de le Appeales in hac parte dirigenda ad prohiben. ipsos ne ipsi admittant notas præd. in Evidentiis in causa prædicta.

Breedon versus Gill, qui tam, &c.

S. C. 2 Salk.
555.

BY a Statute made Anno 12 Car. 2. cap. 23. Certain Impositions are given to the King upon Beer and Ale, and other Liquors, for the encreasing his Majesty's Revenue; and the Forfeitures and Offences within that Act, which are committed within the Limits of the Chief Office of Excise in London, are to be determined by the Commissioners and Governors of Excise appointed by

by the King, or the major Part of them; or in case of an Appeal, then by the Commissioners of Appeal for regulating that Duty.

15 Car. 2.
cap. 11.

Anno 15 Car. 2. An additional Act was made for the better collecting the said Duty, and preventing the Abuses therein; by which it was enacted, That no common Brewer shall set up, or alter, any brewing Vessels, without Notice thereof given to the Office of Excise, or shall use or keep any private or concealed Storehouse, Cellar, or other Place for the laying any Beer, Ale, or Worts in Casks, other than which be used in his Common Brewhouse, and which are openly discovered or known, upon Pain to forfeit 50*l.* for every Tun, Fat, Back, Copper and Cooler, set up and made Use of without such Notice given as aforesaid.

Note. The Appellant is first to lay down the single Duty of Excise in the Hands of the Commissioners, and to give Security to the Commissioners of Appeals for the Fine and Forfeiture which was adjudged against him, if the Judgment should be affirmed upon the Appeal, and likewise to pay double Costs; but if reversed, then the Informer is to pay double Costs.

Vide Show.
158, 172.
1 Sid. 65,
332.
6 Mod. 252.
Farell. 137,
148.

The Plaintiff Breedon suggests for a Prohibition, that by the Laws of England, when an Issue is joined between the Parties, that it ought to be tried by the Evidence of Witnesses *viva voce*, and not by Notes or Minutes of their Testimony. That an Information was exhibited against him before the Commissioners of the Duty of Excise, setting forth, That he was a common Brewer, and did keep a private Storehouse without acquainting the said Commissioners therewith; that he was found guilty, and that he appealed from their Sentence to the Commissioners of Appeals, before whom the Informer did produce, as Evidence, the Minutes taken before the Commissioners of Excise, and that the Witnesses who gave Evidence there were still alive; which Minutes were allowed as Evidence by the Commissioners of Appeals, &c. And now the Question was, Whether a Prohibition should be granted, directed to them not to admit such Evidence?

Carthew 346.

Those who argued for the Prohibition insisted, That such Evidence before the Commissioners of Appeals was irregular, and that it ought not to be allowed in any Court where the Party may be examined *viva voce*.

That the Words of the Statute are penned, as if on purpose to prevent such Proceedings; for after the Appeal is given to the Party grieved, and Authority to the Commissioners of Appeals to determine the same, the Statute requires them to sum-

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mon the Oath, and upon his Appearance or Contempt to examine the Fact, and upon Proof made, either by Confession of the Party, or by the Oath of one or more Witnesses (which Oath two of them have Power to administer) to give Sentence, and to issue out Warrants to levy the Forfeitures, &c.

Vide Nelf.
Lutw. 207,
208.

So that the Statute having provided in what Manner the Commissioners of Appeals shall proceed, and having given them Power to administer an Oath to the Witnesses, it is plain that Depositions taken before the Commissioners of Excise cannot be read in Evidence before them.

Besides, the Reason of the Thing speaks, that such Depositions cannot be given in Evidence there, because the Statute hath not appointed any Officer to take such Minutes, neither is their Clerk upon his Oath, and the Party can have no Remedy against him if he takes such Minutes wrong, nor can he compel him to take them right; he cannot be compelled to put them in Writing, what is done is to help his own Memory, and never signed by the Witnesses till of late.

This is a new Office created by the Statute, and a new Penalty imposed, which must have been determined in the Courts of Common Law, if the Lawmakers had not shewed how the Proceedings should be, and what Proof should be made, (viz.) a voluntary Confession, or Oath of one or more Witnesses, which the Commissioners of Appeals have Power to administer. Now it would have been to very little Purpose to give them that Power, if they might as well admit any former Depositions to be read in Evidence, which indeed can be no Evidence before the Commissioners of Excise themselves, and much less before the Commissioners of Appeals, for they are to hear the Cause originally, without any Regard to what hath been done by the Commissioners of Excise.

The Commissioners of Appeals are directed to proceed in a different Manner from the Common Law, by which Law all Examinations of Fact are to be made by Witnesses and a Jury. It is true, a Jury is not required in this Case, but Witnesses are still necessary to prove the Fact, and that upon Oath viva voce, and the rather because the Party may have Liberty to cross-examine them.

In Detraints, the Witnesses are examined upon Oath de novo, though no other can be produced but such who gave Evidence in the original Cause.

So here the Witnesses are examined by the Commissioners of Excise but on one Side, and Judgment is given by Default; therefore the Party must have a Right to have the Witnesses ex-

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amined

amined de novo upon the Appeal, especially since the Cause is now before another Jurisdiction, which was created for the Benefit of the Party, that he might have Justice done.

18 Eliz. c. 3.

Besides, where-ever an Act of Parliament gives an Appeal, the Fact as well as the Law is always examined upon the Appeal; As for Instance, in the Case of Bastardy, where two Justices have Power by the Statute 18 Eliz. to make an Order to charge the Parents for the Maintenance of the Bastard, from which Order they may appeal to the Sessions, and there it is the constant Practice to examine the Fact again, and not to rely upon the Examination taken before the two Justices.

It cannot be objected, that Depositions taken in inferior Courts, are transmitted both to the Delegates and to the Chancery, and read and allowed there without re-examining the Witnesses; for this Case is not like the Proceedings in those Courts where such Depositions may be read as Evidence, because the Chancery is a Court by Prescription and ancient Usage, and there are Commissioners on both Sides to see Justice done; but a constant Usage cannot be in this Case, for it is a new created Jurisdiction.

The Statute 42 Eliz. gives Authority to two Justices of Peace to determine the Settlement of a poor Man likely to be chargeable to a Parish; but there is an Appeal given to the Quarter-Sessions, but it was never known that the Sessions was governed by any Notes taken by the Clerks of the two Justices who made the original Order.

Post. 308,
309.

The Commissioners of Bankrupts are appointed by a new Law; but if Bankruptcy or not should be the Question at a Trial at Law, the Depositions taken before such Commissioners shall not be read as Evidence, but the Witnesses shall be examined again viva voce.

2. The next Question will be, Whether this Court will now interpose, since by the Statute the Judgment of the Commissioners of Appeals is to be final?

As to that Matter, the Grievance of the Plaintiff begins at this Court of Appeals, who have proceeded in another Method than what is directed by the Act; and therefore the Remedy is proper in this Court, who are not desired to determine the Cause, but only to interpose where another Court useth any extravagant Method in proceeding contrary to their Power.

For this Court prohibits the Courts of Admiralty, and the Ecclesiastical Courts, even in such Cases where they have an original Jurisdiction, if they either deny or delay Justice, So in Suits for Tithes, if any Thing arises concerning the Bounds of Parishes, or a Modus decimandi, they are prohibited; so where they deny the Proof of a Thing by one Witness they will likewise be prohibited, though this Court cannot determine the original Cause; for it is an Oppression which the Common Law will not allow.

So if the Spiritual Court should refuse to give a Copy of the Libel, this Court will grant a Prohibition; Quousque, &c.

So if a Justice of Peace refuse to sign the Rate for the Poor, or if a Corporation will not chuse Officers, it is usual for B. R. to grant a Mandamus, for this is for the Preservation of Order and Government; and such Proceedings are not to take any Thing from a proper Jurisdiction, but to hinder them from proceeding irregularly.

Now though the Statute doth say, That the Judgment of the Commissioners of Appeals shall be final; and though the Commissioners of Excise had a Jurisdiction of the subject Matter, yet if they err in their Proceeding, this Court will take Notice of the whole Fact to do Justice to the Party injured.

As if the Commissioners of Excise should examine Witnesses, but not upon Oath, and give Sentence which is confirmed upon Appeal; this Court would reverse that Sentence, though the Statute is, That the Judgment of the Commissioners of Appeals shall be final.

Econtra.

Those who argued on the other Side said, That where a Jurisdiction is created by Act of Parliament which gives an Appeal, that must be the last Resort; and in such Case this Court may command them to execute their Power, but cannot reform their Judgment.

This Statute gives the Commissioners of Appeals Power to examine Witnesses, but leaves the Method of such Examination to themselves.

Now the Nature of an Appeal is, That the Court, from whose Sentence it is brought, hath done Injustice to the Party, and therefore it is very reasonable that the Superior Court should know upon what Grounds they proceeded below; which cannot be done more effectually, than by reading these very Depositions which were taken there.

The

F.N.B. 41, 42.
Co. 73.
Hob. 247.
1 Show. 179,
353, 396.
Carth. 33, 34,
70, 97, 142.
Ca. in Law
and Equ. 264.
Comb. 15, 16,
109, 110, 462.
Fitzgib. 197,
198.
Raym. 360.
2 Co. 44.
Mo. 761.
Yelv. 86.
Fitzgib. 79,
80.
Carth. 450.
Yelv. 93.
Cro. Car. 333.
Vide 2 Salk.
428, 435.
Ante 257.
Fitzgib. 85.
Mod. Ca. in
Law and Equ.
1st part, 335,
344.
Ca. in Law
and Equ. 54.

The Case now before the Court is not by Reason of any Complaint that some of the Witnesses were not examined, or that the Commissioners of Excise refused to take their Depositions, and examined only one Side, for in such Cases it had been proper to make Application to this Court; but it is to re-examine the same Witnesses; and to what Purpose should that be, unless to deny what they have already sworn which would be to introduce Perjury.

Besides, it would tend to make the Court of Appeals an original Jurisdiction, which is contrary to the very Nature and Intent of Appeals; for those Commissioners are not to admit any new Evidence, they must take the Case as it was before the Commissioners of Excise, and judge whether they have done Right or not.

To say, that Orders and Decrees made by Commissioners of charitable Uses, upon Depositions taken before them, shall not be confirmed by the Court of Chancery, upon reading those Depositions, is not applicable to this Case. It is true, the Matter must be re-examined there, because the Statute gives that Court Jurisdiction in those Cases; for it requires such Orders and Decrees to be certified into that Court, under the Seals of the Commissioners, within such Times as shall be limited in their Commissions, and then the Chancellor is to take such Order for the due Execution thereof as he shall think fit.

Neither can the Practice of the Justices of Peace in the Sessions upon Appeals rule this Case, for they have a discretionary Power to examine the Witnesses again viva voce, or take such Examinations as have been made by those of the inferior Jurisdictions.

Nor is this Case like those where Prohibitions have been granted to Ecclesiastical Courts, because by bringing the Appeal, you admit the Jurisdiction of those Courts.

Ca. in Law
and Equ. 386.
Comb. 254.
Carth. 143.

As for those Prohibitions to Spiritual Courts, where they deny the Proof of any Payment by one Witness, it seems to be very unreasonable when they have an original Jurisdiction of the Cause, that they should not proceed in their own Methods.

It is true, the Statute doth empower them to examine Witnesses upon Oath, but doth not say, whether it shall be in Writing or not. Now if the Commissioners of Excise cause such Depositions to be written which have been taken before them, and transmit them to the Commissioners of Appeals, that is an Examination upon Oath.

It is much better for the Party himself, that the Depositions should be in Writing; for if a Witness should die before he can bring an Appeal, he may have the Benefit of such Depositions to be read in Evidence for him, as well as against him.

Lastly, the Proceedings upon the Statutes against Bankrupts cannot be objected to this Purpose, because such Proceedings in Inferior Courts are not conclusive; but when Actions are brought in this Court, they must be determined according to the constant Method used here.

Neither doth B. R. send mandatory Writs to others to direct them what Judgment to give, but to command them to proceed according to Justice. Now the Commissioners of Appeals have proceeded, and gave Judgment in this Case according to such Evidence as was given below, and it is in their Power whether they will have the Oath in Writing or not; but it hath been the constant Practice to have it in Writing. Comb. 203.

It must be agreed, that this Act hath settled no Course of Proceeding in this Case, it hath only excluded Trials by Jury; and where no such Trials are, the Fact is always determined by Depositions in Writing: As in Chancery, there are Cases of the highest Nature try'd by the Oaths of Witnesses, upon written Depositions taken before an Examiner in a Closet.

Coria. The Common Law doth not require, that Witnesses shall be examined viva voce, but where the Trial is by Jury.

These Depositions were taken in Court, where the Evidence is enter'd, and when that is done, the Party hath nothing to do, but to appeal from an Injury, supposed to be done by an Inferior Court; and it is very fair to transmit that Evidence which was given before them, and upon which they gave their Judgment. Vide ante 9.
1 Salk. 286,
275.
2 Salk. 555.

It is true, they would have the Commissioners of Appeals try the Cause de novo, which is contrary to the very Nature of an Appeal. This Statute directs, That the Commissioners shall proceed by the Oath of Witnesses, or the Confession of the Party: And the last Resort is in the Commissioners of Appeals, if they do not meddle with what is out of their Jurisdiction; which is not the Complaint now, but only of the Course and Method of the Proceedings. 1 Show. 172.
1 Ventr. 291.
Hob. 188.

The Case of Shotter and Friend, which was lately adjudged in B. R. comes near this Case, for there a Prohibition was granted to the Consistory Court of the Bishop of Winton, after Sentence, because they refused to allow the Proof of a Payment of a Legacy by one Witness. Comb. 160.
Carth. 142.
3 Cro. 88,
666.
Moor 413,
907.
Hob. 247,
188.

B b b b

But

But a Prohibition was never yet granted to any Ecclesiastical Court for proceeding according to such Evidence as is allowed by the Common Law; for which Reasons nothing was done at this Time: But after, upon farther Consideration, a Prohibition was granted; Quoad, &c.

Crumwell *versus* Grunsdale.

Midd. ff. **M**Emoran. quod alias, scilicet, Termino Sancti Mich'is ultimo præterito coram Domino Rege nunc & nuper Domina Regina Maria apud Westm. venit Georgius Crumwell per Samuelem Aldridge Attorn. suum & protulit hic in Curia tunc ibidem quandam Billam suam versus Johannem Grunsdale Administratorem omnium & singulorum Bonor. & Catallor. Jur. & Creditor. quæ fuer. Rogeri Urlwyn nuper de Iver alias Ever in Com. Bucks Yeoman defunct. alias dict. Roger Urlin, of Iver alias Ever in the County of Buckingham, Yeoman, qui obiit intestat. ut dicitur in Custodia Mar', &c. de Placito debiti & sunt pleg. de prof. scilicet Johannes Doe & Rich'us Roe quæ quidem Billa sequitur in hæc verba, sc. Midd. sc. Georgius Crumwell queritur de Johanne Grunsdale Administrator. omnium & singulor. Bonor. & Catallor. Jur. & creditor. quæ fuerunt Rogeri Urlwyn nuper de Iver alias Ever in Com. Bucks, Yeoman, defunct. alias dict. Roger Urlwyn, of Iver alias Ever in the County of Buckingham, Yeoman, qui obiit intestat. ut dicitur in Custodia

Mar. Marefc. Domini Regis & Dom. Regina. coram ipsis Rege & Reg. existen. de Placito quod reddat ei quadraginta libras legalis Monetæ Angliæ quas ei injuste detinet pro eo videlicet quod cum præd. Rogerus in vita sua, scilicet, primo die Julii, Anno Domini Millesimo Sexcentesimo Septuagesimo quarto, apud Paroch. Sancti Clementis Dacorum in Com. Midd. præd. per quoddam scriptum suum obligatorium Sigillo ipsius Rogeri in vita sua Sigillat. Curiaque dicti Domini Regis & Domina Regina nunc hic ostens. Cujus dat. est eisdem die & Anno supradict. cognovit se Teneri & firmiter obligari præfat. Georgio in præd. quadraginta liberis per hæc verba in Quadrants libris solven. eidem Georgio cum inde requisit, esset præd. tamen Rogerus in vita sua & præd. Johannes post ipsius Rogeri mortem licet sæpius requisit. &c. præd. quadragint. libras eidem Georgio nondum solverunt nec eorum alter solvit sed illas ei præd. Rogerus in vita sua & præd. Johannes post ipsius Rogeri mortem hucusque solvere omnino contradixerunt & præd. Johannes adhuc contradicit & injuste detinet ad dampnum ipsius Georgii viginti

viginti librarum & inde producit sectam, &c.

Et modo ad hunc diem, scil't. diem Mercurii prox. post Octab. S. Hillarii isto eodem Termino usque quem diem præd. Johannes habuit licent. ad Billam præd. interloquen. & tunc ad respond', &c. ante quem diem præd. Dom. Regina Maria diem suum clausit extremum, coram dicto Dom. Rege apud Westm. venit tam præd. Georgius per Attorn. suum præd. quam præd. Johannes per Robertum Stone Attorn. suum, & idem Johannes defen. vim & injuriam quando, &c. & dicit quod ipse de debito præd. virtute scripti obligatorii præd. onerari non debet quia dicit quod scriptum obligatorium præd. non est factum præd. Rogeri Urlwyn & de hoc ponit se super patriam, & præd. Georgius inde similiter, &c. Ideo venit inde jurat. coram Domino Rege apud Westm. die Mercurii prox. post Quinden. Paschæ & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies datus est partibus præd. ibidem, &c. postea continuatur inde Processus inter partes præd. de Placito præd. per Jur. posit. inde inter eas in respectu coram Dom. Rege apud Westm. usque diem Veneris in Crastino Ascensionis Dom. nisi dilect. & fidelis Domini Regis Johannes Holt, Mil. Capital. Justitiar. dict. Domini Regis ad Placita in Curia ipsius Domini Regis coram ipso Rege tenen. assign. prius die Mercurii prox. post quinque Septimanas Paschæ apud Westm. in

Magna Aula Placitor. ibidem per formam statuti, &c. ven. pro defectu Jur', &c. ad quem quidem diem coram quo, &c. misit hic recordum suum coram eo habit. in hæc verba, sc. postea die & loco infra content. coram Johanne Holt, Mil. Capital. Justitiar. Domini Regis ad Placita in Curia ipsius Domini Regis coram ipso Rege tenen. assign. associat. sibi Johanne Ince, generoso, per formam statuti, &c. ven. infra nominat. Georgius Crumwell, per Attorn. suum infracontent. & infrascript. Johannes Grunsdale licet solempniter exact. non ven. sed default. fecit, ideo Jur. unde infra fit mentio capiatur versus eum per default. & Jur. Jurat. ill. exact. quidam eorum videl't Jacobus Partheridge de Paroch. Sancti Egidii in Campis, &c. venerunt & in jurata illa Jur. existunt & quia resid. juratæ ejusdem Jur. non comperuerunt. Ideo alii de circumstantibus præd. Vic. Com. Midd. infrascript. ad hoc elect. ad requisitionem præd. Georgii Crumwell ac per Mandatum Capital. Justitiar. præd. de novo apponuntur quorum nomina Panello infrascript. affilantur secundum formam statuti in hujusmodi casu nuper edit. & provis. ac Jur. sic de novo appo'it videlicet Johannes Caine & Timotheus Thornbury exact. similiter venerunt qui ad veritatem de infracontent. simul cum al. Jur. præd. prius impanellat. & jurat. dicen. elect. triat. & jurat. dicunt super Sacramentum suum quod quidam Rogerus Urlwyn intestat.

intestat. præd. Johannes Grunsdale in Vita sua simul cum quadam Anna Urlwyn Ux. præfat. Rogeri signaverunt & sigillaverunt ac uterque eorum signavit & sigillavit & ut fact. suum deliberaverunt & uterque eorum deliberavit præfato Georgio Crumwell quoddam scriptum in forma scripti obligatorii quod quidem scriptum sequitur in hæc verba.

ff. Noverint universi per præsentem nos, Rogerum Urlwyn, and Anne my Wife, of Iver alias Ever, in the County of Buckingham, Freeman, Teneri & firmiter obligari Geo. Crumwell in Comitatu præmto. de viginti in quadrants, Libris bonæ & legalis Monetæ Angliæ solven. eidem Geo. Crumwell aut suo certo Attorn. Executoribus, Administrato-ribus vel Assign. suis, ad quam quidem solutionem bene & fideliter facien. obligo me Hæredes, Executors & Administratores meos firmiter per Præsentem: Sigillo meo sigillat. dat. primo die Julii, Anno Regni Regis Caroli Secundi 26^o, Anⁱ Dom. Mille. sexcentel. septuages. quarto.

The Condition of this Obligation is such, That if the above-named Roger Urlwyn and my Wife, his Heirs, Executors, Administrators, or Assigns, shall pay, or cause to be paid to the above-said George Crumwell, his Heirs, Executors, Administrators, or Assigns, the Sum of twenty Pounds and twelve Shillings, of good and lawful Money of England, in and upon the twen-

ty-fifth of December next ensuing the Date hereof, at or in the Dwelling-house of the above-said George Crumwell in Sunbury, that then this present Obligation shall be void, and of no Effect, or else to remain in full Force and Virtue.

Roger Urlwyn.

The Mark X of Anne X Urlwyn.

Prout per idem scriptum liquet & apparet sed utrum super totam materiam præd. per Jur. præd. modo & forma compert. scriptum obligator. præd. in Narratione infrascript. specificat. sit factum præd. Rogeri Urlwyn necne iidem Juratores penitus ignorant & inde petunt advisamentum & considerationem Curiz hic & si super totam materiam per ipsos juratores in forma præd. compert. videbitur Curiz hic quod scriptum præd. in Narratione infrascript. specificat. sit factum Rogeri Urlwyn intestati tunc iidem Juratores dicunt super sacrum suum quod præd. scriptum est factum præd. Rogeri Urlwyn intestat. & tunc assidunt damna ipsius Georgii Crumwell occasione detentionis debiti infrascript. ultr. mis. & Custagia sua per ipsum circa sectam suam in hac parte appo'it ad duodecim denar. & pro mis. & Custagiis il. ad viginti solid. & si super totam materiam præd. per ipsos juratores in forma præd. compert. videbitur Curiz hic quod præd. scriptum non sit factum præd. Rogeri Urlwyn intestati tunc iidem

iidem Juratores dicunt super factum suum quod scriptum præd. non est factum præd. Rogeri Urlwyn prout præd. Johannes Grunsdale interius placitando allegavit sed quia Curia dicti Domini Regis nunc hic de iudicio suo de & super præmissis reddent.

nondum advisatur Dies inde dat. est partibus præd. coram Domino Rege apud Westm. usque Diem prox. post de iudicio suo de & super præmissis illius audient. eo quod Curia dicti Domini Regis nunc hic inde nondum, &c.

Crumwell *versus* Grunsdale.

S. C. 2 Salk.
462.

DEBT upon a Bond for 40 l. brought against the Defendant as Executor of Roger Urlwyn. The Plaintiff declared, That Roger Urlwyn alias Urlin, 1674. did by a certain Writing obligatory sealed by him, &c. become bound to the Plaintiff in 40 l. by these Words, (viz.) In Quadrants Libris.

2 Jones 78.
Comb. 60, 86,
187, 226,
477, 478.
Carth. 204.
2 Rep. 5.

Upon Non est Factum pleaded, the Jury found a Special Verdict, (viz.) They find that Roger Urlin did sign, seal, and deliver to the Plaintiff a certain Writing following; Noverint, &c. nos Rogerum Urlin, &c. teneri & firmiter obligari Georgio Crumwell in Com. prædict. Mid. de viginti in quadrants libris, &c. dat. primo Die Julii, Anno Regni Regis Caroli secundi, 1674. they find the Condition of the Obligation was for Payment of 20 l. 12 s. that it was signed with the Mark of Roger Urlwyn.

The Question was, Whether the Bond found by the Jury will warrant that set forth in this Declaration?

Those who argued for it insisted, 1. That it was a good Declaration, and a good Verdict. They agreed, That if the Condition had been collateral, there might have been some Difficulty to find out the Meaning of these Words in the Bond: But here the Bond and Condition make one entire Obligation, and the Viginti shall be rejected as Surplusage; for it can have no Signification here, because it is not according to the Condition.

If so, then Quadrants must be taken to be the Word to signify the Sum in which the Obligor intended to be bound, and then no Rule in Law will be broken; for though it is an insensible Word, yet the Bond is good.

As for Instance, a Man was bound in Sessanta for Sexaginta Libris, and the Bond was held good; so if a Man is bound in *Septuaginta & quinquaginta Libris, this is good for 750 l. tho' the Jury did not find that the Obligor intended to be bound in such a Sum.

2 Roll. Abr.
147.
2 Cro. 208.
idem.
Hob. 19.
* Hob. 116.
2 Roll. Abr.
147.

C c c c

2. But 147.

1 Brownl. 110.
Yelv. 193.
Idem.

Noy 21.

20 Ed. 4. 1.
21 Ed. 4.
38. b.

2 Cro. 136.
2 Roll. Abr.
706.
Styke 414.

2 Rep. 5.

2. But the second and more difficult Point was concerning the Date of this Bond, which seemed impossible; for the Year of the Lord was applied to the Year of the King's Reign.

And as to that, there was a Case Anno 8 Jac. which was relied on for this Purpose, (viz.) The Bond was full of false Latin, and is transcribed by Justice Yelverton, who was Counsel for the Plaintiff; it was dated, Tres viginti Die Octobris, Anno Regni Regina Domini nostri Jacobi, Dei Gratia Angliæ, Scotiæ, &c. de Scotiæ sexto, de Angliæ quadragesimo secundo, 1608. and upon Demurren the Plaintiff had Judgment; for in that Case the Parties to the Bond, and the Sum in which the Obligor was bound, was sufficiently expressed; and though there was no such Year as the 42d Year of that King's Reign over England, or the 6th of Scotland, that was not held material, because a Day may suggest a Date where there is no Date at all, if the Deed is good; for the Defendant must answer that, and not the Date.

The Law was held to be so Anno 21 Ed. 4. for then an Action of Debt was brought on a Bond, in which the Plaintiff declared for so much Flemish Money, and shewed that the Bond was dated 8 Die Decembris, Anno 78, without saying what Year of the Lord or of the King, when it ought to have been Anno 1478. This was held to be a void Date, and that the Plaintiff might declare of what Date he would since the Bond delivered, and say *Primo deliberat* on such a Day.

So where Debt was brought on a Bond, dated 15 Novembris, 25 Eliz. and upon *Non est Factum* pleaded, the Jury found that the Bond was dated 15 Novembris, Anno 23 Eliz. but not sealed until 18 Novembris, 26 Eliz. and the Court was unanimously of Opinion, That the Verdict was well found for the Plaintiff; because upon this general Issue it appeared to be the Defendant's Deed, tho' there was a Variance in the Date of the Bond itself upon which the Plaintiff had declared.

So it was held in Goddard's Case, that the Date was not any Part of the Substance of the Deed: That Case was thus, (viz.) Goddard, as Administrator, brought an Action of Debt upon a Bond against the Defendant, which was made to his Intestate, and dated 4 Aprilis, 24 Eliz.

The Defendant pleaded, That the Intestate died before the Date of that Bond; and concluded his Plea, That the Writing *Non est Factum*, &c. The Jury found that the Defendant did deliver it as his Deed the 30th of July, in the Year before, at which Time the Intestate was living, and they found the Bond in hæc Verba, but that he died before the Date in April, yet

yet the Plaintiff had Judgment: For though in Pleading he cannot allege the Delivery before the Date, because he is supposed (that is, he is concluded to set forth the Truth) yet that shall not conclude the Jury to find it.

Econtra.

It was argued on the other Side, 1. That Quadrants will not answer the Word Quadraginta; and that in all the Cases where Bonds of this Nature have been adjudged good, the Words which denote either Tens or Hundreds are plain and clear.

As to the Case of Parry and Dale in my Lord Hobart, Fol. 119. he hath reported it different from all the Reporters of that Time; for it was, Noverint univervi per presentes nos, &c. teneri, &c. in quinguegentis Libris; this was adjudged against the Plaintiff in this Court, because Quinguegentis was not a Latin Word: It is true, upon a Writ of Error brought in the Exchequer-Chamber, he tells us, That most of the Judges were of Opinion, that was a good Bond for 500 l. but no Judgment was given upon the Writ of Error, the Cause being ended by Agreement: But all the other Reporters of that Case say, That the Word ended in Gontis, which always signifies an hundred Pounds. Justice Croke tells us, That it was in quemquegentis Libris. Justice Yelverton says, It was in quimquegent; And my Lord Rolle, in quinguegentis Libris: And yet Judgment was given for the Defendant, because Quimque or Quemquegent was an insensible Word, by which a Man could not be bound.

Cro. Eliz. 146.
Yelv. 65.
2 Roll. Abr. 146.

So in Walter and Piggot's Case, the Septua for Septingentis Libris, had a plain Signification; for Septua is Part of a good Latin Word, as Septuaginta.

Cro. Eliz. 417.

But Sexagint can never be taken for Sexcenta, for there is no such Word, as it was held in the Case of Gery and Davis; and the Justice Croke hath reported it to be Sexagintis, yet Judgment was given for the Defendant.

Yelv. 105.
2 Roll. Abr. 147.

It is true, if it had been Sexigint or Sexingint for Sexaginta, that is good, because those Words have all the same Intendment, and the Ginta is right; but Quadragent for Quadraginta is wrong, and so is Octigent for Octoginta.

2 Cro. 338.
Style 241,
257.
2 Roll. Abr. 147.
Hob. 19.
3 Cro. 208.
Hob. 19.

Sellanta instead of Sexaginta Libris has been held good, because it was an Italian Bond, and not intended to be put into Latin.

So is Octogesimo Libris a good Bond for 80 l. for it hath the same Signification.

2 Roll. Abr. 147

But

But the Word Quadrants in this Case is insensible, there is no such Latin Word, and so the Defendant is bound in no Sum at all; and if so, the Plaintiff cannot have Judgment upon this Declaration, and Acedit either as to the Sum, for that is not known; nor in what Year the Bond was made. And as to that,

2. The Variance between the Date of the Bond as found by the Jury, and the Date in the Bond on which the Plaintiff declared, is very material; for the Date in the Declaration is Part of the Description of the Bond itself; and by saying Cujus dat. est eisdem Die & Anno, the Plaintiff hath tied himself to that very Date, and therefore it is necessary that should be found.

It cannot be denied, that if he had declared on a Bond *geren. dat.* such a Day, and the Bond had been found to be of another Day, that had been void. Now this is to the same Effect, for there can be no Difference between *geren. dat.* and *cujus dat. est*, &c.

The Date of the Deed which the Plaintiff hath set forth in his Declaration, is the only Thing which can entitle him to an Action; and if the Date of the Bond found varies from that Date, then there is no such Bond as that upon which he had declared.

Cro. Eliz. 603. If a Man makes a Feoffment in Fee, dated 10 Septembris, and the Feoffee reciting, that a Feoffment was made to him 11 Septembris, gave Authority to another to receive Liberty and Seisin for him, *secundum formam Chartæ*: This was held a void Feoffment, because the Warrant to receive Liberty is by a Letter of Attorney, which gave him Power to take it, *secundum formam Chartæ*, dated 11 Septembris, when in Truth the Feoffment was made the Day before; so there being no Feoffment made on that Day, by Consequence he could not have any Warrant to receive Liberty, *secundum formam Chartæ*, dated the 11th Day; therefore it was held void.

As to Goddard's Case, that cannot be urged as an Authority against the Defendant, because the Jury did find the Date of the Bond to be according as the Plaintiff had declared: For in Truth, the Bond was dated 4 Aprilis, 24 Eliz. and the Plaintiff declared upon a Bond of that Date, and the Jury found it in *hæc Verba*, tho' the Delivery was before, (*viz.*) in the Life-time of the Plaintiff's Intestate; but here the Jury have found the Date of a Bond, which differs from that upon which the Plaintiff declared, so not like this Case.

In *Dodson and Key's Case*, which was objected out of *Yelverton* on the other Side, tho' the Fear of the King was mistaken, as in this Case, yet the Fear of the King 1608, was right; which was the true Reason that prevailed with Justice Croke to give Judgment for the Plaintiff. Yelv. 193.

In *Lane and Plegdall's Case*, reported in 2 Cro. 136. the Declaration was general; but in all these Cases the Jury found it to be the Deed of the Defendant, tho' dated at another Time; but here they have not found it to be his Deed, but that he sealed quoddam scriptum, and so leaves it to the Court to judge, whether it was the same Deed upon which the Plaintiff had declared; so that if there is any Variance between the finding of the Jury, and the Declaration of the Plaintiff, the Court cannot judge it to be the same Bond. 2 Cro. 136.

Curia. The Court held the Date in this Case to be impossible, so it is a void Date. The Plaintiff hath declared upon a Bond cujus dat. est such a Day, and the Jury find the Bond to be of an impossible Date; so that the Bond found by the Verdict cannot be the same upon which the Plaintiff had declared; and upon this Exception they inclined against the Plaintiff: But Adjourn'.

Lyndsey versus Sir Thomas Clerke.

S. C. 1 Salk.
54.

IN Ejectment there was a Verdict for the Plaintiff in B. R. and a Writ of Error brought in the House of Peers: A Motion was afterwards made for the Direction of the Court, whether a Capiatur shall be awarded against the Defendant? Which is usually done ex Officio, for a Fine to the King for a Breach of the Peace: But now by a late Statute it is enacted, That no *Capias pro fine* shall be prosecuted against the Defendant, either in Trespass, Ejectment, Assault, or false Imprisonment: In Lieu whereof, the Plaintiff is to pay the proper Officer upon signing the Judgment six Shillings and eight Pence, over and above the usual Fees; so that now it will be Error to have a Capias awarded, since the Act prohibits its Execution by remitting the Fine: Therefore the Court was of Opinion, That the Capias should be wholly omitted. Vide 3 Lev. 401, &c.
Carrh. 390.
S. C.
5 & 6 W. & M. c. 12.

Blackwell *versus* Eales.

IN Trespass, Assault, and false Imprisonment, the Plaintiff declared, That the Defendant primo Die Februarii, Anno Regni Domini nostri Willielmi Tertii nunc Regis Angliæ, &c. octavo, Vi & Armis, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and the Posse being stayed, the Question was, Whether the Plaintiff should have his Judgment? For the Declaration was of Easter Term last, and he had declared of a Trespass on the first Day of February, 8 Will. which Time was not yet come.

It was argued for the Judgment, That an impossible Time is no Time at all, and that this Mistake shall be helped by the Verdict; that the Plaintiff could never have had a Verdict, unless the Trespass had been proved to have been done before the Bill filed, and that he could give nothing in Evidence after the Action brought.

2 Cro. 626.

So where the Plaintiff declared, That the Defendant retained him in such a Parish, quod aptaret & conficeret a Suit of Cloaths for him, and doth not shew the Day or Place; this was held good after a Verdict.

Econtra.

Comb. 30.

But on the other Side it was said, That the Plaintiff could not have Judgment in this Case: For as it is certainly true, that he should never recover where the Cause of Action appears to be after the Suit commenced; so the Reason is the same, where the Day is not come at the Time of the Judgment given, as where the Cause appears to be after the Action commenced; and the Reason why it is erroneous, is because the Plaintiff had sued, when it appears he had no Cause for such Suit.

When the Defendant had pleaded Not guilty, he then denies the Charge in the Declaration, and it is impossible that the Jury should find him guilty of a Fact which never was committed; therefore it must certainly be wrong to give a Judgment for that, which upon the Face of the Record appears to be impossible.

2 Leon. 75.
Moore 188.

The Want of alleging a Place cannot be helped even after a Verdict, as in an Action on the Case, in Nature of a Conspiracy brought against two, setting forth, That they were joint Merchants of a Stock of Wares, and did not shew where: The Plaintiff

Plaintiff had Judgment; but it was reversed in the Exchequer-Chamber for that very Reason.

Now if want of alleging a Place is not helped after a *Clerdix*, no Reason can be given why want of Time should.

The Case of Hambleton and Veer is an express Authority, that the Plaintiff cannot recover Damages for a Time to come after the Action brought; it was an Action on the Case, wherein the Plaintiff declared, That one Veer became his Apprentice on the 29th of September, Anno 16 Car. 2. and was to serve him nine Years. That he served him five Years; and the Defendant on the last Day of October, 21 Car. 2. had procured the said Apprentice to depart out of his Service, per quod the Plaintiff lost the Profit of his Servant per totum residuum Termini prae. ventur; and it was adjudged, That the Plaintiff could not recover Damages for so much of the Term which was to come.

Saund. 169.
Lev. 299.
Keb. 693.
697.
Mod.

It is true, that too much Time was laid in that Declaration; And the Reason why the Plaintiff could not recover Damages, was, because the Apprentice might return. But in this Case, the Jury could not have any Consideration of a Time which was not come.

As to the Objection, That an impossible Time is no Time; and if so, the want of alleging a Time is helped after *Clerdix*. That may be true, and yet not to this Purpose, because here is a certain Time set forth in the Declaration, which will come.

Time and Place are such material Circumstances, that they require Certainty in a Declaration, and some Day must be laid before the Action brought, which is not done here; for to make this to be a Will. you must reject twenty Days, which will never be allowed.

Curia. There must be Evidence given of a Fact done before the Action brought, the Time is but a Circumstance of a Thing done; for when by a Traverse it is made Part of the Issue, such Traverse is never good. So the Plaintiff had Judgment.

Rex versus Keat.

THE Defendant was indicted at the last Assizes, both at Common Law, and upon the Statute of Stabbing, for the Murder of one James Wells; which Indictment being tried before the Chief Justice, the Jury gave a Special *Clerdix* to this Effect, (viz.) That before the said Fact committed, (viz.) the 15th of June, 1696, the Defendant did retain the said James Wells to serve

Vid. Kelynge's Reports, the Case of *Mauw-bridge*, Ibid.
Jac. 1. c. 8.
Skin. Rep. 665.
S. C.

serve him as a Gardener, and being in a little Room near the Kitchen, did send to the said Wells to deliver the Key of the Garden to the Defendant, which he refused to send. That one Henry Phillips, who was the Person sent to demand the Key, returned and told the Defendant, that Wells refused to deliver it. That the Defendant immediately went into another Room and fetch'd his Sword, and came to the said Wells, and expostulated with him about the Delivery of the Key: That the said Wells told the Defendant, he might have it if he would, thereupon the said Defendant struck him on the head with his Sword, and Wells having a Dagger of a Knife in his Hand, struck at the Defendant; but the Force of the intended Blow was prevented by the Back in the Kitchen in which the Knife stuck: That afterwards the said Wells thrust at the Defendant several Times, and thereupon the Defendant killed him with the Sword. And whether this was Murder or not, was the Question.

The Defendant being at Bar, desired that Sir Bartholomew Shower, and Mr. Eyre might be his Counsel, which was granted; and Mr. Cowper was assigned by the Court to be of Counsel for the King.

Comber. 111,
298.
Stylk 467.

Then they moved that he might be bailed, being a Gentleman of Quality; which was denied by the Court, as it was in Buckner's Case: The Chief Justice affirming, That the Court could not bail in Manslaughter till after the Party had his Clergy allowed.

Comber. 406,
407. S. C.

In Hillary Term next, it was argued for the King, That this was Murder, and that for two Reasons, though there was no express Malice found:

1. Because the Defendant was doing an unlawful Act when the Death of the Party did ensue.
2. The Deceased was killed without any Provocation. And in both these Cases the Law doth imply Malice.

Jones 340,
430.
Godb. 154.
Stylk 467.
3 Bull. 67.
3 Inst. 51.
M. P. C. 44.

1. The Defendant was doing an unlawful Act, which was, in correcting his Servant with a Sword drawn, a very improper Instrument for that Purpose; and Death thereupon ensuing, the Law will imply Malice from the Nature and Manner of doing it, so make the Act Murder.

2. That the Defendant was doing an unlawful Act, which was, in correcting his Servant with a Sword drawn, a very improper Instrument for that Purpose; and Death thereupon ensuing, the Law will imply Malice from the Nature and Manner of doing it, so make the Act Murder.

My Lord Coke mentions several Cases which have been adjudged Murder, where Death immediately follows the doing unlawful Act, as in stealing Deer in a Park, and the Thief shooting at the Deer, and killing a Boy in a Bush; so the shooting at a Cock or Hen, or any other tame Thing in which our both a Property, and a Man is killed: This is Murder, because the Act was unlawful.

There could be no Malice in those Cases either against the Man or Boy, for the Defendants were not acquainted with them; but the Facts being unlawful, the Law couples the Event to the Cause, and so implies Malice to make it Murder.

Now, my Lord Coke goes a little farther, for he tells us, That if Death do ensue on an Act done with an ill Intent, tho' that Intent extends not to Death, and tho' the Criminal did not know the Party slain, yet 'tis Murder. And he gives an Instance of a Man throwing a Stone over a Wall amongst a Multitude of People, which he knew were coming from Church, with an Intention only to fright them, and one is killed; this is Murder: And this is applicable to the Case at Bar, for the Defendant might not intend to kill his Servant when he first corrected him with a Sword; but that being a very improper Instrument for Correction, both shew that he had some ill Intent, and Death ensuing, 'tis Murder.

Agreeable to this was the Resolution formerly in B. R. in the Case of Wormall and others, Anno 18 Jac. they entered Hyde-Park, and one Hillock and others, who were Servants to the Keeper, commanded them to stand, which they refused, but then: Whereupon one of the Servants shot at them, and wounded one. Then they all turned back, and one of them killed Hillock; for which they were all indicted for Murder *ex Malitia premeditata*, and were convicted; for tho' there was no Malice to the Party slain, yet they all coming into the Park with an ill Intent, and to do some unlawful Act, and Death ensuing, the Law doth imply Malice.

The like Indictment was against my Lord Dacres and others for the like Offence, for which they were convicted and executed.

Now all these Cases extend to make that Murder by Implication of Malice prepensed, where Death doth ensue by the Means of doing some unlawful Act by the Person killing, tho' Death was not at first intended by him.

But there is yet a stronger Case, where, by the Opinion of all the Judges of England, it was ruled Murder in the Keeper of a Park for killing another, though the Person killed was at that

3 Inst. 56, 57.
2 Rolls 120,
460.
2 Cro. 296.
12 Co. 87.
Hawk. Pl. Cr.
1st Pt. cap. 29.
§ 9.
Hawk. Pl. Cr.
cap. 31. § 18,
19, 20.
Hales's Pl. Cr.
1st Pt. 425,
449, 450, 466.
Kryl. 127,
130.

3 Inst. 57.

2 Roll. Rep.
120.
Palmer 35.
idem.

Moore 86.

that Time doing an unlawful Act himself: And this was Holloway's Case; which was thus.

Cro. Car. 121.
Palmer 17.
Jones 198.

A Boy climbed a Tree in Austerly Park to the Boughs, and Holloway the Woodward commended him to come down, which he did: then he tied him with a Rope to a World's Tail, and struck both the Boy and the Tree; which falling away, and the Boy thus tied about his Shoulder, and thereupon he immediately died. This was adjudged Murder, though Holloway had no Intention to kill the Boy: but being killed without making any Resistance, by one who had no Authority to punish him in that manner; and though the Person thus killed was doing an unlawful Act in cutting the Boughs, the Law supplies that defect was preposed, which was the Reason of that Judgment.

Now the most favourable Thing which can be said for the Defendant Rear, is, that his Servant sent him a heavy Winter, for which he might have corrected him; but then it must be done with a fit and proper Instrument, and not with a Sword.

It is not a material Objection to say, That because he had no Intention to kill his Servant, therefore it cannot be Murder: for in Holloway's Case before mentioned, he had no Intention to kill the Boy, yet that was held Murder.

11 H. 7. 23.
Placito 14.
Hale's Pl. Cr.
1st Pt. 39,
445, 472.

The Law was the same Anno 11 H. 7. when Richard Chief Justice gave the Rule, (viz.) That if two were playing at Sword and Buckler by Consent, and one strikes the other, it is Felony, because such Plays are unlawful, and yet there was no Intention of killing.

So in this Case, the first Act of beating the Servant with a Sword was unlawful; and it hath been constantly ruled, That where Death doth ensue an unlawful Act, 'tis Murder: for it cannot be intended in this Case, that the Master did that at his Servant's with a Sword *Animo corrigendi*.

Sid. 277.

So 'tis where A. meets B. in the Street and cudgels him, and B. draws his Sword, then A. kills him, 'tis Murder: for the first Act of beating him was unlawful, and the ill Event shall be coupled to the first Act.

2. The Deceased was killed without any Provocation; and in such Cases likewise the Law supplies what is preposed.

The pushing the Prisoner with the Head of the Sledge, cannot be a Provocation to justify this Fact, because it was in Defence of his Person. It was antecedent to the Fact begun by the Master which was unlawful, (viz.) the striking the Servant with a Sword; for which Reasons this must be Murder.

Econtra.

Econtra.

Those who argued for the Defendant, began with the Definition of Murder, which in the old Books is defined to be occulta Hominis occisio; and the Reason of it was, because in former Ages, when the Danes and Normans inhabited here, the Malice between them and the Englishmen was so great, that if any Person was killed and not known by whom, the Murderer was taken to be either a Dane or Norman, unless there was plain Proof that it was done by an Englishman.

It hath now another Definition, for Murder is where a Man of sound Mind and Memory maliciously killeth a reasonable Creature in Reum Natura under the King's Peace with Malice forethought, either expressed by the Party, or implied by Law, so as he be slain a Year and a Day after the Fact.

3 Inst. 47, 48.
Dalt. 93.
Hawkl. Pl. Cr.
1st Pt. cap. 31.
Sect. 9.

Malice must therefore be the Foundation of Murder, both at Common Law and upon the Statute of Stabbing; and such Malice, my Lord Coke tells us, is the compassing to kill, wound, or beat another *Sedato Animo*: So that if there is any sudden Occasion of Heat or Quarrel amongst Men, and they immediately fetch their Swords and go into the Field to fight, and one is killed; this is not Murder, because it was not *Sedato Animo*, without which there can be no Malice, and consequently no Murder.

3 Inst. 51.

The Law of God doth admit this Distinction, and hath in some Places dispensed with the Sixth Commandment, by which we are forbidden to kill: For God commanded the Children of Israel when they divided the Land of Canaan, to give the Levites the Cities of Refuge, and to appoint some such Cities for themselves, that the Slayer might fly thither who killed another unawares, that is, without Malice; and this was to preserve himself from the next Kinsman, who had Power to put him to Death: But his Power did not extend to take Revenge of him who killed another without any Malice; and therefore this Remedy was provided, lest he should destroy him in his Rage.

Numb. Chap.
35.

But if he move the Deceased with an Instrument of Iron, that is, purposely or maliciously to kill him, or with throwing a Stone which might probably kill him, or with a hard Weapon of Wood, or if he thrust him out of Rats, which must be Malice forethought, or slay him in Enmity so that he died, in all these Cases 'twas Murder.

So that if the Man-slayer was not in Enmity with the Person slain, or did not seek his Harm; then the Magistrates of the City were to give Judgment between him and the next Kinsman, and

and to deliver him to the City of Refuge whether he fled, where he was to be confined till the coming of the High Priest.

'Tis plain therefore, That if there was no Malice in the Slayer against the Person slain, he was not to be punished as a Murderer by the Law of God.

Sanctuaries were also allowed here in England formerly; but they were taken away by the Statute 23 Hen. 8. which likewise taken away the Benefit of Clergy from those who shall commit wilful Murder of Malice prepensed. And another Statute made Anno 1 Ed. 6. provides, That in other Cases, that is to say, if there is no Malice prepensed, the Party shall have the Benefit of the Clergy, and the Privilege of Sanctuary.

To apply this to the present Case, there is no express Malice found: So that if there was any, it must be implied by Law either for killing the Servant in Pursuance of an unlawful A. he gun by the Master, or by killing him without any Manner of Provocation, as it hath been argued against the Prisoner.

1. Malice cannot be implied in this Case for killing the Servant in Pursuance of an unlawful A.

My Lord Coke hath put the Case so generally as to the Unlawfulness of the A., that little can be collected from it: he tells us, That if the first A. is unlawful, and Death ensues, 'tis Murder. 'Tis true, he instances in a Man intending to steal a Deer in a Park, and shooting at the Deer, he kills a Boy hid in a Bush; this he says is Murder, though he had no Intent to hurt the Boy, because the first A. was unlawful: So likewise in the Case of throwing a Stone over a Wall and killing another, which has been observed on the other Side, this is Murder, because the Law implies Malice.

But my Lord Hale was of another Opinion, for he tells us, That if the unlawful A. wants Deliberation, or if no Personal Hurt was intended to another, 'tis no more than Man-slaughter.

Besides, that Intent must extend to Death, for if 'tis only to commit a Trespass, or to beat a Man, and Death doth ensue, that will not make it Murder.

Therefore my Lord Coke distinguishes with too much Nicety upon the Life of a Man, and directly contrary to the Levitical Law, and not warranted by the Authorities which he hath cited in the Margent of his 3d Institutes: Which are these:

The

The first is, Anno 2 H. 4. which is no more than the Opinion of the Court, That if a Man killeth another by Misfortune he shall forfeit his Goods, but shall have his Pardon ex Gratia. Now this is rather an Authority for the Pardon, than against it.

1 H. 4. 18.

The other Case was, Anno 11 H. 7. where by the Opinion of Fineux, Chief Justice, it is held, That if two play at Bow and Buckler by the Command of the King, and one is killed, 'tis not Felony; but if the King had not commanded it, it is otherwise: For though such Games are suffered, they are not lawful; which is as much as to say, that the King may tolerate what is unlawful, and that is not to be presumed.

11 H. 7. 23. 2.

The same Chief Justice was of Opinion, That if a Man throw a Stone over a House and killeth another, 'tis not Felony; which is denied by Brooke in abridging the Case, so that it is but one Judge's Opinion against another: Besides, Fineux doth not say, 'tis Murder, but only Felony; neither doth he mention whether that Felony is without the Benefit of Clergy.

Bro. Abr.
Tit. Coron.
Placito 228.

And my Lord Coke himself gives some Instances, where Death did ensue an unlawful Act, and yet it was not Murder. As if two Men fall out, and presently fetch their Swords and go into the Field and fight a Duel, and one is killed, 'tis not Murder, because there was no Malice prepensed. Now it cannot be denied, but that 'tis an unlawful Act to fight a Duel, and yet he was of Opinion, that this was not Murder.

3 Inst. 51.
Hawk. P. C.
1st part, c. 31.
§. 21, 22, &c.

Those Cases, of shooting at a Deer and killing a Man are not applicable to this Fact; for the Act of shooting was not only unlawful, but it was voluntary, and the immediate Cause of Death: So likewise was the throwing a Stone; for tho' no Malice was intended to the Person slain, yet 'tis plain that the Slayer did not value who was killed.

Therefore great Care ought to be taken to distinguish rightly in such Cases where the Life of a Man is concerned. For my Lord Coke's Distinction is too narrow, in saying, that it is Murder if Death doth ensue an unlawful Act, because the Act must not be only unlawful, but voluntary.

If a Man should climb an Apple-Tree to steal the Fruit, and fall down by Misfortune upon the Head of another under the Tree, and kill him without hurting himself: This is not Murder, and yet no Man will deny but stealing the Apples was an unlawful Act, and Death did ensue that Act; but the Fall which was the Cause of it was involuntary, and therefore it was not Murder.

Hale's P. C.
1st part, 426,
427, 428,
471 to 477.

It is likewise to be considered, whether the Act is done sedato Animo, or in Passion; for if in Passion, the not material who was the Aggressor shall answer it, and so, though A. gave the first Blow, yet B. is liable: If there is no Passions between A. and B. and they fight like A. is killed, he is charged in B. though A. gave the first Blow, so if he had assaulted B. and then fled to a small, and so his own Defense has killed him: Tho' it is questioned by my Lord Hale, whether this is qualified by not.

But both these Cases are bad where the Matter was suspended, for tis not what is the material Matter to make it Murder, and not by whom the first Stroke was given.

The Case in Croke is much stronger than this was at Bar.^{III} Two Boys were fighting in a Field, one beat the other so that his Nose bled. The Boy then home to his Father, being a Mile distant from the Place where they fought, and complained to him, who immediately came into the Field where the other Boy was, and after some cold Language threw him with a Girdel, of which Straws he used. This was a strong & manslaughter only, because it was upon a sudden Occasion. The father was provoked by seeing his Son's Blood, and no precedent malice in him; and though it was at the Distance of a Mile, yet it was but one continued Passion, and the first Heat of Blood not cooled.

It was a Tale which my Lord Hale put for Law; and yet it was as unlawful for the Father upon such a Prohibition to correct that Boy, as it was for the Prisoner to beat his Servant.

10 The Case of Wornall, mentioned on the other Side, is not
like this, because he and his Companions came with a malicious
Intent to rob the Party, and either to maintain their Purpose,
or kill their Opposers.

"And as for Holloway's Case, the Act was so barbarous, that it could not be found otherwise than murder; for the Boy who was killed, gave the keeper no manner of Provocation, but submitted himself to his Mercy, and he turned him over to the Mercy of his Horse.

2. Malice cannot be implied in this Case by killing the Servant without any Provocation, becaufe there was uncharitable and irreverent Language given by him to his Master. 'Tis true, this is not such a Provocation which will justify the Master in striking his Servant on the head with a Sword, much less for killing him; but still it is a Provocation, and the Books men-

tion,

H. P. C. 47.
Hale's P. C.
1st part, 466,
467.

2 Crd. 296.

Hawk. P. C.
1st part,
c. 31. 9. 27,
28, 32 to 40

H. P. C. 48.

Hank. Pl. Cr.
1874-75, 76
1876-77, 78

Hawk. P. C.
1st part, c. 29.
S. r.

tion, that the Law implies Malice where a Man is killed with-
out any Provocation, which is not this Case, for there was a
Provocation.

A Butcher and others quarrelled, and in the Street the
Butcher was hurt. One of the Persons in that former Quarrel
came by his Shop three Days afterwards and made a Wound
at him: upon which he came out of his Shop and cut him on
the Calf of his Leg with a Sword, whereof he instantly died.
Now here being a former Quarrel, which had continued three
Days, the Court, upon the whole Matter, directed this to be
found Murder: but if there had been no precedent Quarrel,
and the Wound had been given upon a sudden Provocation, by
making a Wound, without any Intention of killing at that
Time, it had been otherwise.

9 Rep. 67. B.

Noy 171.

Cro. Eliz.

694. 778. id.

Curia. It was justifiable in the Servant to use the Sneak of
the Stibe after a Cut made on his Head by his Master. The
Provocation given to him was very tender and may be esteem'd
as none at all, because after the Answer sent by the Servant,
the Prisoner did expostulate with him for some Time. Sed ad-
journalur.

Swinsted v. Lydall. Trin. 8 W. 3. Rot. 229.

S. C. Salk.
408.

AN Action of Trespass and false Imprisonment was brought
by the Plaintiff, and for detaining him in Custody until he
had paid 11s. for his Deliverance.

The Defendant pleads the Jurisdiction of the Court of Con-
science in London. That they had Power to make Orders and
exact Obedience to them. That an Order was made by that
Court for the Plaintiff to pay 10s. 4d. &c. which he not per-
forming, the Defendant took him by Virtue of a Precept of
that Court, and so justified the Imprisonment, and detaining
him till he had paid that Sum.

Skin. Rep.
665. S. C.

To this Plea the Plaintiff demurred, because the Justifica-
tion did not go to the whole Sum of 11s. but only to 10s.
and 4d.

To which it was answered, That the Sum was no Part of
the Trespass, but only an Aggravation of the Damages; That
the Imprisonment was justified, which in this Case is sufficient,
so that the Defendant could not be punished for false Imprison-
ment, though he might for Extortion; but that must be by an-
other Action.

Moor 704,
705.
3 Cro. 667.
2 Sand. 5.
1 Roll. 265.

As

f Roll. Rep.
264.

As for Instance: In an Action of Assault and Battery, and false Imprisonment, at Charkon, till he had paid 28L.

The Defendant pleaded Not guilty as to all besides the Imprisonment; and as to that, by justified by a Process out of the Court of Summaries, by which whereof he took the Plaintiff, and detained him till he paid the Money: And upon Demurrer to this Plea, one Exception was, That the Defendant having pleaded Not guilty as to all besides the Imprisonment, he must of Consequence be guilty as to the taking the 28L. and then the Justification of the Imprisonment till he had paid the 28L. is repugnant in itself, so that he ought to have made a particular Answer to the Payment of the 28L. and on that point.

But the Court was of another Opinion, because having answered the Imprisonment, that shall be a good Answer likewise to the Payment of the Money, for that takes in the whole Substance of the Action.

So that this Plea is good, though it doth not come up to the whole Sum; for if he had said nothing to it, yet his Plea had been good.

2. Another Exception was, That the Defendant did not set forth, that he took the Plaintiff to carry him to the Compter.

The Answer was, That 'tis sufficient to say, that he took him Virtute Præcepti. 'Tis true, by Law the Defendant ought to have carried him to Prison, but he may keep him a reasonable Time in his Custody till he can find Bail, and it is not false Imprisonment, tho' he doth not immediately carry the Prisoner to Gaol.

See 2 Geo. 2.
c. 22.

Curia. This is a special Authority given by Act of Parliament to this Court of Conscience to commit, &c. but the Officer is not to detain the Person in Custody till the Money is paid to him; for neither he or the Sheriff should receive it, unless it is upon a Ff. fa. And afterwards in Hillary Term for this Reason Judgment was given for the Plaintiff.

But on the 11th of June 1734 the Court was divided 4 to 4 on this point.

by the Court.

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Rex versus Bishop of Chester, Peirce and Cook.

S. C. 2 Salk.
560.

THIS was a Writ of Error to remove a Record of Quare Impedit brought against the Bishop of Chester, and Richard Peirce, and Richard Cook, for hindering the Plaintiff to present to the Church of Bedall, setting forth, That Queen Eliz. 12 Feb. Anno 12. of her Reign, was seized of the Abbotsdon of Bedall in Fee ut de uno grosso, and being so seized, she presented there, unto one John Tymms, prout by the Enrolment of such Presentation in the Court of Chancery, and there remaining, it doth appear, That Tymes was instituted and inducted, and that after the Death of the Queen, the said Abbotsdon descended to King James.

Parliament
Cases, 212.
Quare Impedit.
Vide 3 Lev.
377.
4 Mod. 200.
Hob. 224,
230.
Moore 413.
2 And. 32,
36, 154.
Post. 335,
336, &c.

That the Church being void upon the Death of Tymms, the King presented Dr. Willson, and afterwards died seized, and the said Abbotsdon descended to King Charles I.

That upon the Death of Dr. Willson, that King presented Dr. Wickham, who was instituted and inducted, and died.

That upon the Death of Dr. Wickham, one John Peirce, the Father of Richard Peirce the now Defendant, did present William Metcalfe by Usurpation, who was likewise instituted and inducted.

That upon the Demise of that King, the said Abbotsdon descended to King Charles II. who 28 August, Anno 1. of his Reign, did present one Peter Samwaies, upon the Death of the said Metcalfe.

That the said Abbotsdon did afterwards descend to King James II. upon whose Abdication it came to King William and Queen Mary. That the Church became void by the Death of Samwaies, so that it belonged to them to present, who were hindered by the Defendants.

The Defendants Plea.

The Bishop pleaded, That he claimed nothing but as Ordinary; upon which there was Judgment against him in common Form.

The other Defendant Richard Peirce pleads, That bene & verum est, that King Charles I. was seized of this Abbotsdon, de uno grosso ut de feodo, prout in the Declaration, and that he presented Dr. Wickham, who was instituted, &c. But farther saith, That the said King being so seized, did by Letter Patents dated 19 Julij, Anno 14. of his Reign, grant the same to William Feekstone, tunc Armigero, postea Militi, and to his Heirs.

G G G G

That

That John Peirce did by Usurpation present the said Metcalfe, and that Sir William Feckstone released the said Abbotsdon to Peirce and his Heirs; who thereupon became seized in Fee, and died so seized.

That the said Abbotsdon descended to the Defendant Richard Peirce. That the Church became void upon the Death of Metcalfe, and that afterwards King Charles II. did present the said Samwaies by Lapse, who died; so that now it belonged to him the said Richard Peirce to present, and traversed that King Charles I. died seized modo & forma.

The other Defendant Cook pleads the like Plea by Way of Excuse; (for he could not plead to the Right of the Abbotsdon) and that Richard Peirce presented him.

The Attorney General demands Oyer of the Letters Patents of King Charles I. which are entered in hæc Verba, reciting that Q. Eliz. granted to the Earl of Warwick, and his Heirs, the Manor of Bedall, and the Abbotsdon thereunto appendant, habend', &c. in Capite by the fortieth Part of a Knight's Fee, which Rent descended to King James, who 18 August, Anno 7. of his Reign, granted the same to Sir Christopher Hatton and his Heirs; and that the Abbotsdon did afterwards come to Sir William Feckstone and his Heirs, to whom the King did ratify and confirm the same.

In which Grant there is another Recital and Clause, confirming all that was granted by Queen Elizabeth and King James; and that Sir William Feckstone, by Virtue of that Grant, claimed the said Abbotsdon.

That upon a Vacancy by the Death of one Petty, King James did present Dr. Wilson by Lapse; and after his Death King Charles presented Dr. Wickham, against whom Sir William Feckstone brought a Quare Impedit.

That being an Issue, an Agreement was made, that Dr. Wickham should hold the Living during his Life. Then follow these Words:

Si. Know ye therefore, That we ex ulteriori Gratia nostra concedimus Willielmo Feckstone Militi, advocacionem, donationem & liberam dispositionem Ecclesie de Bedall quando & quomodo se shall become void, Habendum to him, his Heirs and Assigns; under whom Peirce the now Defendant claimed.

This being the Case upon the Letters Patents and the Pleadings, there was a Demurrer to this Plea, and Judgment given in the Common Pleas, That the Grant made by King Charles I. was a void Grant, because it was of this Abbotsdon as appendant to the Manor of Bedall, when it was an Abbotsdon in Gross; and if so, the Defendants have not well induced the Traverse.

It was now argued for them, That the Letters Patents were good; for admitting that this Abbotsdon was granted by the Queen to the Earl of Warwick, as appendant to the Manor, when it was in Gross; it doth not therefore follow that King Charles, reciting that bold Grant in his Letters Patents, can give no Title to Sir William Feekstone; for every Mistake or Misapprehension in Letters Patents will not make them void: As for Instance, If the King should be mistaken in the Law, when he is truly informed of the Fact, that will not make his Grant void.

Carthew 321.

But it doth not appear that the Queen was mistaken in her Grant, for she was not only seized of this Abbotsdon, but of the Manor of Bedall by the Death of one Simon Digby; then she granted it as an Abbotsdon appendant, and K. Charles I. granted it as such. Therefore it must be a very immaterial Allegation at this Time to say, That it was in Gross, especially since it tends to vitiate two Royal Grants, one of them being made above one hundred and twenty Years since: So that tho' the Queen might be mistaken then, yet that Mistake shall not turn to the Prejudice of the Defendant's Title now, because of the Length of Time; for they cannot take Issue upon it, whether Appendant or not, or traverse that it was an Abbotsdon in Gross.

Neither doth the Attorney General rely upon this wholly as his Title, but he goes on and lays a Seisin in King James and Charles; he might have begun it in either of those Kings, which would have been good to revert the Abbotsdon in the Crown; and there was no Necessity to resort to the Seisin of the Queen, for it is not material whether she was seized of this Abbotsdon in Gross or not, or whether she was seized at all, because the Defendant could not take Issue upon it, or traverse it: So that it being not material to their Title, and they having no Way to come at it in Pleading, this Court will not take Notice of it; or if it doth, the Judges will expect a very clear Evidence, that it was an Abbotsdon in Gross in the Queen, before they will avoid those Letters Patents by a Suggestion that it was not.

It is plain, that the Queen granted the Abbotsdon to the Earl of Warwick, and whether Appendant or not, is but Surplusage, and need not be set forth. As where the Demandant brought a Forfeiture in Descender upon the Grant of a Reversion to two by Fine, the Remainder to his Ancestor who was seized, &c. the Tenant would have taken Advantage that there was no such Fine: But the Court would not admit it, because the mentioning a Fine was but Surplusage; for a Forfeiture in Descender may be maintained without Deed or Fine.

9 H. 4. 39. a.
14 H. 4. 31. a.Cases in Law
and Equity,
362, 367.

1 Rep. 41.
Moore 413.
2 Rol. 114.
2 And. 154.
1 Jo. 79.

So where the Defendant pleaded to an Information of Intrusion, That before that Time Anne Countess of Warwick was seized in Fee, and that he, Anno 3 H. VII. levied a Fine to him, and the Heirs Males of his Body, the Reversion to the Countess and her Heirs, after whose Death it descended to Edw. Earl of Warwick, her Cousin and Heir, who, Anno 19 H. VII. was attainted of Treason by Act of Parliament: By which Statute it was enacted, That he should forfeit all his Lands; so that H. VII. was seized of the Reversion in Fee. After whose Death, both the Estate-Tail and Reversion in Fee descended to H. VIII. That 5 Julii, Anno 23. of his Reign, it was found by Office, that the Countess did levy a Fine, that she died seized of the Reversion, that it descended to the Earl of Warwick, that he was attainted of Treason Anno 19 H. VII. by Force of which Attainder King H. VII. was seized in Fee, and died seized; after whose Death it descended to H. VIII. who granted it to one Walsh.

Exception was taken to this Pleading, because it did not appear when the Earl of Warwick died; for tho' it is said in the Act of Attainder, That he shall forfeit; yet those Words bear nothing in the King at Common Law until Death or Office found; so that there could be no Seisin in H. VII. as alleged; and if so, it could not descend to H. VIII. therefore that Allegation being wrong, it made the Grant to Walsh void.

But the Court was of another Opinion, That the Plea was good in Substance, for they would not take Notice of the Seisin of H. VII. and the Descent from him to H. VIII. for that was altogether immaterial, because H. VIII. was entitled by Virtue of the Office found, and therefore his Grant to Walsh was good.

So here the Court will not take Notice, whether the Queen was seized of this Advowson either as Appendant or in Gross: For when King James, and King Charles, had presented to the Church, and their Presentees were instituted and inducted, and enjoyed the same under such Presentations, it is not material whether the Queen was seized or not.

Neither can it be objected, That the Defendant in Pleading hath alleged this Advowson to be in Gross. It is true, he saith, That bene & verum est, that King Charles was seized thereof in Fee ut de uno grosso, but that cannot be any Concession that it was so in the Queen.

And after all, admitting that the King was mistaken in the Law, yet if he was truly informed of the Fact, such a bare Mistake shall not abate his Grant.

8 Rep. 55.
2 Lev. 171.
172.
3 Lev. 135.

Here the Letters Patents of the Queen are truly recited, of which he was well apprised; then there happens to be a false Suggestion of the Patentee, and the King ratifies and confirms it, but did not grant all that was in those Letters Patents. Now if he apprehended that the Admonition passed by this Grant, it is his own Collection, and not what was falsely suggested by Sir William Feekstone.

So is my Lord Chandos's Case, to whom H. 7. granted a Manor in Fee. And the same King by other Letters Patents reciting the former Grant, and that in Consideration of the Surrender thereof to be cancelled, that he was and is seized in Fee, did grant the said Manor to Husband and Wife, and to the Heirs of the Husband, &c.

6 Rep. 37.
Hob. 224.
2 Roll. Rep.
277, 278.
360.
Lane 3, 7.
9, 76, 122.

Now tho' by the Surrender of the first Letters Patents, the Estate Tail was not determined, and so the King not seized of the Manor in Fee as he recited he was in the second Grant, for he had only a Reversion in Fee expectant upon the Determination of the Estate Tail, yet that Clause, (viz.) By Virtue whereof we are seized in Fee, was but what the King collected to be the Consequence of the Surrender. So that being truly informed by the Party both of the Intail and the Surrender, the Mistake which he made in the Law being no Part of the Consideration shall not abate his Grant.

But admitting in the present Case, that the Queen was mistaken in her Grant, and so it became void; yet King Charles having recited the same by other Letters Patents, and having granted this Admonition to Sir William Feekstone, and his Heirs, non obstante aliquo defectu vel aliquibus defectibus in the Queen's Grant, he hath a good Title by such Grant; for otherwise these Words signify nothing: But the natural Sense and Meaning of them is, That if the Grant of the Queen was not good, yet this shall be a good Grant to the Patentee.

Therefore it is a good Rule taken in the Earl of Cumberland's Case, That if the King's Grant may be taken to two Intents, one of which may be good, and the other not, it shall be construed to such an Intent, that the Grant may take Effect:

8 Rep. 167.
Lane 39, 40.
Comb. 308.
1 Rep. 45. b.
46. a. b. 48. a.
49. a.

As if he grants totum illud Manerium suum sive totam illam Rectoriā sive Advocationem, &c. Now if he had a Manor and no Rectory, or an Admonition and no Rectory, or a Manor, or a Rectory impropriate; yet that which he had shall pass, because it was the Effect of the Grant. So here, whether the Admonition was Appendant or in Gross it is not material; for nothing shall pass but what the King had.

H h h h

After.

Regist. 287. b.

Ca. in Law

and Equ. 284.

Litch. 161.

Cro. Ca. 205.

Comb. 65.

2 Inst. 594.

Bro. Addi-

tion 58.

Comb. 40. 188.

7 H. 4. 7. b.

14 H. 6. 15.

Bro. Title

Nofine, Pla-

cito 33.

Ca. in Law

and Equ. 207,

208.

Mod. Ca. in

Law and Equ.

1st part, 84.

Carth. 14, 96,

207.

1 Salk. 7, 50.

2 Salk. 462.

22 H. 6. 29. b.

Bro. Title

Nofine 61.

1 Vent. 13,

154.

1 Shower

394.

Litch. 161.

contra.

Hutt. 41.

Lit. Rep. 181.

Jones 215.

* 2 Cro. 240.

4 H. 6. 1.

Bro. Grants,

Placito 50.

2 Ed. 4. 232.

Long quinto

266. b.

2 Roll. Abr.

198.

2 Cro. 240.

1 Bull. 11.

Idem.

Afterwards in Hillary Term the Court gave Judgment, viz. Two Judges were of Opinion against the Judgment in the Common Pleas, not upon the Matter in Law, but for the Variance between the Pleading and the Letters Patents: for the Defendant hath set forth a Grant made to William Feckstone, tunc Armigero postea Militi, and upon Oyer of the Letters Patents it is to William Feckstone Militi.

Now he could not be a Knight and Esquire at the same Time, Knight is a Word of Dignity, and Part of his Name, but Esquire is not; and so are all the old Authorities.

A Bishop entered into a Bond; the Obligor was then an Esquire, but afterwards made a Knight, and died. An Action of Debt was brought against the Bishop by the Plaintiff, and Executor of such a one Esquire; which was according to the Bond: But Rickhill, Chief Justice of the Common Pleas, gave Judgment, That the Writ should abate, because he was not named Knight.

So where the heir apparent of the Earl of Shrewsbury brought an Action by the Name of John Talbot Knight, and pending the Suit, his father died: The Question was, Whether the Writ should abate, because the Plaintiff was then an Earl? Prisott, Chief Justice of the Common Pleas, held that it should not; but it was for this Reason, because his Dignity descended to him by the Act of God. But if it had come to him by the Act of the King, it had been otherwise.

It is likewise so where there is an Addition of Knight, when the Person is not knighted, as where it is omitted when he is really so; for in both Cases it is hold in Pleadings or Grants, tho' not in a Conveyance: And the Reason is, because Knight being made Part of the Name of the Grantee, when in Truth he was not so, he cannot be intended to be the same Person mentioned in the Grant.

As to the Lord Ever's Case, who had a Grant made to him by the Name of Ralph Ever Knight, Lord Eure, when he was not at that Time a Knight. It is true, it was held good, because satis constar de Persona by the Addition of Lord Eure, for there is but one Lord of that Name in England, and therefore the Addition of Knight, tho' false, shall not vitiate the true Description of the Person.

So if a Grant should be made to John Bishop of Winton, when his Name was Peter, the Grant is good; for there is but one Bishop of Winton, and therefore he is sufficiently described by that Addition.

Econtra.

Contra.

But the Chief Justice, and Rokeby Justice of B. R. were of Opinion, That this was a good Grant in Law; for they did not speak to the Variance between the Pleadings and the Grant.

They held, that it was not material to alledge the exact Time when the Queen was seized of this Admowson in Glos, it is sufficient to alledge a Seisin generally; and therefore an Admission of that which is immaterial will not help.

As in Debt upon Bond, conditioned, That if the Plaintiff did not depart out of the Defendant's Service without his Leave, &c. then if he paid the Plaintiff 100 l. within twenty-eight Days, upon Demand, the Bond shall be void. The Defendant pleaded, That the Plaintiff, 4 Maii, 30 Eliz. departed out of his Service, and without his Leave.

The Plaintiff replied, That, 6 Septemb. in the same Year he departed with Leave, and that afterwards 4 Octob. he demanded the 100 l. which the Defendant refused to pay, absque hoc that he departed, 4 Maii, without Leave.

It happened that the Demand was laid to be 4 Octobris, and the Writ was Teste 18 October, so that there was not twenty-eight Days between the Demand and the Action brought: yet the Plaintiff had Judgment, tho' upon his own shewing he brought the Action fourteen Days too soon; for the Issue was upon the Departure, and the Demand in the Replication was altogether immaterial, and therefore shall be rejected as surplusage.

Every Thing in a Grant shall be intended to be good, if the contrary hath not appear. As in Debt upon the Statute, 2 Ed. 6. for not setting out Cithes, the Plaintiff declared, That the Defendants were Occupiers of one hundred and twenty-eight Acres of Meadow in Radley, and he derived a Title under Letters Patents of Queen Elizabeth to himself for Life, out of which,

The Defendant prayed Oyer, &c. and it appeared that the Queen demised the Cithes of certain Lands in Bremere, and Barton Bremere in the Parish of Radley, but did not mention the 128 Acres, &c. yet upon Demurrer Judgment was given for the Plaintiff, tho' it did not appear that the Cithes of 128 Acres was granted to him by those Letters Patents, neither was it averred, that those Acres were any of the Lands mentioned in the Letters Patents, because the Plaintiff had alledg'd that the Queen granted to him prædictas decimas, which was a

sufficient

2 Leon. 99.

Hob. 71.

2 Cro. 679.

So likewise where Edw. 6. granted Totam illam Rectoriam de Dale, ac omnes decimas, &c. quae quidem omnia & singula parochia
are of the true yearly Value of 32l. and at the Time of this
Grant there was a Farm in the Parish of Dale, in Lease under
a yearly Rent. Now the Lords, Quae quidem omnia, &c. refer
only to Tithes of that yearly Value, and it may be the King
intended to pass no more; yet having granted Totam illam Rec-
toriam generally, it was adjudged, That the Tithes of that
Farm should pass, though it made it more than 32l. per An-
num.

The true Way had been to have taken Issue upon the Tra-
verse.

Gatehouse *versus* Row.

S. C. 2 Salk.
663.

W RIT of Error on a Judgment in the Common Pleas, in
an Action on the Case upon an Indebitatus Assumpsit and
Quantum Meruit, brought by Gatehouse for Meat, Drink, &c.
which the Defendant had when he stood for Burgess for Stock-
bridge, and declared upon three several Promises, the last of
which was thus, (viz.) Cumque etiam prod. (the Defendant) in con-
sideratione that the Plaintiff at his Request had found and pro-
vided for him Meat, Drink, &c. super se assumpsit, and doth not
say, that the Defendant super se assumpsit. This Cause being
tried at the Assizes at Winton, and a Verdict for the Plaintiff Gate-
house, and entire Damages given; it was now moved in Arrest
of Judgment, That the last was a void Promise, because it was
not alleged, That the Defendant had promised: So that possibly a
Stranger might make the Promise, and then the Defendant is
not bound by it.

Vide 6 Mod.
227, 260, &c.
1 Samsl. 65, 7.
1 Sid. 309.
3 Lev. 55.
Farell. 143.

3 Cro. 79, 80.
147, 149.
660.
2 Cro. 504.

It cannot be taken by Intendment to be the Defendant, be-
cause it is the very Gift of the Action, and since the Jury have
found that Row super se assumpsit modo & forma, and have assessed
entire Damages occasione promissarum, and every Promise being a
distinct Declaration, and one of them being wrong laid, it is
therefore naught.

As for Instance, in Assumpsit the Plaintiff declared, That in
Consideration he would marry the Defendant's Daughter, super
se assumpsit, to pay the Plaintiff 100l. Upon Non assumpsit plead-
ed, the Plaintiff had a Verdict, but the Judgment was arrested,
because it was not alleged that the Defendant super se assumpsit,
which is this very Case in Point.

Cro. Eliz.
913.
Noy 50.
Idem.

Vide 1 Balk.
23, 24, 27,
28.

This might have been good in an Indebitatus Assumpsit, because where there is a Debt, the Law fixeth a Promise upon the Debtor to pay it.

Econtra.

To which it was answered, That if the Consideration be void, then the Jury have not given Damages for it, for they cannot give a Verdict either for no Promise, or a bad Promise.

As to that Case in Croke before-mentioned, there were three Persons named in that Declaration, of which the Defendant's Daughter was last named, and the Words super se assumpsit immediately following might relate to her, which was the Reason of that Judgment; but here there are but two Persons named, so that when the Plaintiff declares against the Defendant, it must of Necessity be intended, that the Defendant assumpsit, and Nobody else, because the Consideration arises from him, and those Words, Cumque etiam in the third Promise, couple that Sentence to the first.

1 Sid. 306.
2 Vent. 141.
Cartw. 6,
86, 304.
Cro. El. 848.

If it had been, that the Plaintiff assumpsit to pay himself, it had been good after a Verdict.

So if there are several Considerations alledged in one Declaration, and one of them is sufficient, tho' the other are wrong, both as to Matter and Form, yet the Declaration will be good.

Sid. 292.
Litch. 125.
2 Cro. 59.
Fitzgib. 174,
275.
Comber. 149,
150, 284,
426, 427.
3 Cro. 173.
Cases in Law and Equity 185, 331, 301.
Styles 295.

So where an Assumpsit was brought against an Executor upon the Promise of the Testator, and the Defendant pleaded, That he himself made no such Promise; after a Verdict it shall be intended to refer to the Promise of the Testator.

Afterwards in Hillary Term the Plaintiff had Judgment, it being after a Verdict.

1 Vent. 122. 1 Sid. 218. 3 Lev. 336. 1 Roll. Abr. 577.

Warsopp ver. Abell. Trin. 8 W. Rot. 594

Copyhold in
Remainder
vests before
Admirance.

IN Trespass and Ejectment for a Copyhold, upon the Demise of John Spencer, the Jury found a Special Verdict; the Substance whereof was, That John Spencer purchased this Copyhold, and on the 23d of October, Anno 1652, took a Surrender thereof to the Use of himself for Life, then to Alice his Wife for Life, and to the Survivor of them; and after their Decease, then to the Use of the last Will of the said John Spencer, and for Default of such Will, to his own right Heirs, and that he was admitted, &c. That he made a Will, and devised all his whole Estate, both real and personal, to Alice his Wife, after his Decease,

Decede, the Remainder to be divided between his Relations on both Sides, according to the Discretion of his Executors, and died.

Vide 1 Salk. 185.

They find that the Executors did enter with an Intent to divide the Estate, pursuant to their Will; but that they were not admitted to this Copphold.

2 Brownl. 301. Cro. Jac. 31.

So that the Question was, What Estate was vested in them before Admittance, and what passed by this Will?

4 Co. 22. Cro. El. 662.

And it was held, That the Admittance of Tenant for Life, upon a Surrender, is an Admittance of those in Remainder.

4 Leon. 111. Moor 356.

1 Mod. 102, 120.

Bennet *versus* Talbot.

S. C. 1 Salk. 212.

IN Trespass the Plaintiff declared, De Placito quare vi & armis clausum ipsius (the Plaintiff) fregit & intravit herbam pedibus ambulando conculcavit & cum averiis Bobus & Vaccis did eat his Grass, nection that the Defendant being an inferior Tradesman, viz. a Clothier, actunc & ibidem in clauso præd. venatus fuit & alia enormia ei intulit contra pacem, & contra formam statuti, &c.

Carthew 382. S. C.

There was a general Verdict for the Plaintiff at the Assizes at Salisbury, and it was moved in Arrest of Judgment, because Part of the Action was for a Trespass at Common Law, and Part upon the Statute; and having concluded contra formam statuti, that goes to the Whole.

The Statute 13 R. 2. enacts, That no Layman who hath not Lands of the yearly Value of 40 s. nor Clerk who hath not 10 l. *per Annum* Revenue, shall have or keep a Greyhound.

13 R. 2. cap. 13.

The Statute 22 & 23 Car. 2. provides, That Persons not having Lands, or some other Estate of Inheritance in their own or Wives Right of 100 l. *per Annum*, or of 150 l. *per Annum* for Life, or for ninety-nine Years, shall not keep Guns, &c. And in the same Year it was enacted, That if the Jury find the Damages under 40 s. in Actions of Trespass, the Plaintiff shall recover no more Costs, and if more Costs are awarded, the Judgment shall be void.

22 Car. 2. cap. 25.

Mod. Cases in Law and Equity, Part 1.

238.

See 3 Geo. 1. cap. 11.

9 Ann. c. 25.

Cases in Law and Equity,

26, 27.

4 & 5 W. & M. c. 23.

By the Statute 4 & 5 Will. it is enacted, That all and every Law and Statute now in Force, for the better Preservation of the Game, shall be duly put in Execution.

Then there is this Clause, (viz.) And whereas great Mischiefs do ensue by inferior Tradesmen, Apprentices, and other dissolute Persons neglecting their Trades and Employments, who follow Hunting, Fishing, and other Game, to the Ruin of themselves, and

and Damage of their Neighbours; for Remedy whereof, *Te it enacted, &c.* That if any such Person, as aforesaid, shall presume to Hunt, Hawk, Fish or Fowl (unless in Company with the Master of such Apprentices duly qualified by Law) such Person or Persons shall be subject to the Penalties by this Act, and shall or may be sued and prosecuted for their wilful Trespas in such their coming on any Person's Land, and if found guilty, the Plaintiff shall not only recover his Damages, *thereto Damages*, but his full Costs of Suit, &c.

Now this Clause is a Repeal of the Statute 22 & 23 Car. 2. which gives no more Costs than Damages. As to the Matter of Costs,

It was said, *This was an independent Clause; the Plaintiff should have declared that he hunted, being an inferior Tradesman, which had been sufficient to entitle him to Costs upon a general Law; and the Act itself had been to nullify contra formam statuti.*

As for Instance: One was indicted for stabbing another, and two others for being present, and assisting, and concluded contra formam statuti; they were all found guilty, where it is plain he could only be so who gave the Stroke; yet that Indictment was held good, because they might have been found guilty at Common Law upon the same Indictment; for the Statute does not alter the Nature of the Offence, but takes away the Privilege of the Clergy allowed by Law, and does not conclude contra formam statuti.

But this being moved in Hilary Term, the Court was of Opinion, that where a Statute makes an Offence, the Conclusion must be contra formam statuti. But this was an Offence before the making that Act, which only repeals that Clause of the Statute 23 Car. 2. and therefore the Declaration concluding contra formam statuti, it is well enough: And so the Plaintiff had Judgment nisi causa.

Bracey versus Harris.

BRACEY was summoned before the Commissioners of Bankrupts, to give an Account of the Bankrupt's Estate.

The Questions demanded of him were,

1. To give an Account of all Matters which he knew concerning the said Estate.

2. When

Aleyn 43.
Hales's Pl. Cr.
Part 1. 437.
468, 469.
4 Co. 43. b.
Hawk. Pl. Cr.
Pr. 1. cap. 30.
§. 7.
Hales's Pl. Cr.
Part 2. 344.
345.

8. Co. 1. Salk.
348.
Vide Ibid.
351.
Comber. 390.
391. S. C.

2. When and in what Manner he did aid and abet the Bankrupt in carrying away his Effects, or in hiding or concealing the same?

Which Questions he refused to answer, because the first was too general, and the other was to accuse himself; so that he would be liable to the Penalty of double the Value of the Goods which were concealed: He was willing to answer what he could at present, or to any particular Question which the Commissioners should ask.

But upon his Refusal to answer those two Questions, he was committed; and having brought an Habeas Corpus, it appeared upon the Return, that the Warrant of Commitment concluded, that Bracey should be committed until he conform to the Authority of the Commissioners: Which was now alleged to be a void Commitment, because they have a special Authority given them by Act of Parliament, That if the Party shall refuse to be sworn, and to answer such Questions as shall be ministered to him, that then the Commissioners, or the greatest Number of them, may commit the Person refusing to Prison, there to remain without Bail, &c. until he submit to the Commissioners to be examined, and not till he conform to the Authority of the Commissioners: And therefore it was moved, that he might be discharged.

To which it was answered, That as to the general Questions, the Statute doth not give the Commissioners Power to ask such Questions, even of the Bankrupt himself; and that the Conclusion of the Warrant is well enough, for the Words of the Act are, That the Commissioners may commit till he submit to be examined; which is a Consequence that he conform to their Authority.

Curia. But the Court seemed to incline, That the Party need not pay an universal Obedience to the Commissioners, so as to answer all Questions, but only to examine him what he knows concerning the carrying away any Part of the Bankrupt's Estate by any Person, but not by himself.

But for that Fault in the Conclusion of the Warrant of Commitment, Bracey was discharged.

Stat. 28.
28.
28.

Per Stat.
13 Eliz. c. 7.
Sec. 5 Geo. 2.
c. 30.

1 Jac. c. 17.

Vide Post.
368.
1 Salk. 348,
351.

S. C. ante
227.
2 Salk. 1,
173.

Jones v. Bodiner. Plach. 8 W. Rot. 382.

AN Action of Trespass was brought in this Court for taking
the Plaintiff's sheep, of which he was the owner, from the
Defendant's pasture, as an Attorney of the
Court of Common Pleas. The Plaintiff's plea, Quod per aliquos proventus Curie hic
a quibusdam clericis proventus, et per aliquos proventus Curie hic
Will'us Bodiner tempore exhibitionis Billæ ipsius (the Plaintiff)
scilicet 25 die Martii, Anno Regni Dom. Will'i Tertii contra Regem Angliæ,
Sec. Octavo, fuit in custodia Mar. Marci, Dom. Regis, coram ipso
Rege existent, fuit apud Westm. pasc. in Cons. pasc. et festum eu-
jusd. Catharine Medorum vid. in quibus Placito transig. de aduoc.
et ibidem per Curiam pasc. idem Will'us tradit fuit in Ballium in
Placito pasc. et festum Catharine pasc. pasc. per Recordum
inde in Curia dicti Domini Regis coram ipso Rege pasc. hic apud
Westm. pasc. coramien. super quo pasc. (the Plaintiff) postea scilicet
eodem 25 die Martii, Anno Octavo supradicto (Placito pasc. pasc.
Catharine minime determinat existit) secundum eandem hic a tem-
pore regis contrarii memorie hominum usitat. et approbat. Billam
suam versus pasc. Will'us in Curia hic exhibuit pasc. et bene li-
cuit, & hoc pasc. est verissimum, unde petit iudicium de quod pasc.
Will'us ad Billam suam pasc. respondens, Sec. B. 3.11 pasc. 8.3
Denuncer, and Denuncer in Denuncer. In the said action for the Defendant, that he being in the Cu-
stody of the Marshal, had not power to take from the Plaintiff his
sheep, as an Attorney of the Common Pleas, and to prove
it, a Case was cited out of the Year-Book, which was an
Action of Trespass brought in B. R. supposing it to be done in a
Parish, and the Verdict of that Bench was demanding Cog-
nizance (which is the same thing as Pleas) it was supposed,
because it was not claimed until the Pleas were continued:
that the Court was of Opinion, that it might be demanded at
any Time. It is by Compulsion of Law, that the Defendant was in
Custody of the Marshal, and therefore he shall have his Pleas
of Attorney of the Common Pleas, but if he had admitted the
Jurisdiction of B. R. it had been otherwise.
Judgment, that the Bill shall abate.

Comb. 319.
Carrh. 126,
363.
22 Affile,
Placito 83.

27 H. 6. 6. 2.
2 Roll. Abr.
275.

23 H. 6. c. 15.

2. This Action is founded on the Statute 23 H. 6. which directs how and in what manner the Sheriff, after the Receipt of the Writ, shall make his Precept under his Seal, (viz.) To the Mayor, &c. (returning the Writ) and commanding him by the said Precept (if he is in a Borough) to chuse a Burgess by Burgeses.

But this Precept, as said in the Declaration, is directed to the Mayor to chuse one Burgess of the different Ward of the Borough, and not to say by Burgeses.

It is not enough for the Plaintiff to say, That he was a free Burgess on such a Day, &c. and that he was chosen on that Day; for he ought to set forth how, and by whom, either by the Burgeses, or by Virtue of the Precept directed to the Mayor and Burgeses, which gives them Power to chuse. The Plaintiff might have waived this Action of Debt, and brought one for a false Return; but having founded it on the Statute for a Sum certain, and not pursued the Directions on that Statute, he cannot come at the Penalty.

3. The Action is not well brought as to the form in the Commencement of it, for it is in Debt. *Tam pro Domino Rege quam seipso*, when in such Case the King ought to be made a Party. The Difference is thus:

If when a Statute makes an Offence, and adds no Penalty, the Action brought against the Offender must be *Qui tam*, &c. but where a Penalty is given to the Party injured, the King must never be joined in that Action.

Moore 63.
1 And. 138.

Cro. Eliz.
621.
Moore 911.

Roll. Entr.
446, 186.
Placit. Rod.
72.
Plowd. 118.

Now in this Case, there is a particular Measure of the Subject's Wrong, and likewise a Measure of the Forfeiture to the King; for which Reason, they ought not to be joined in this Action.

As in Debt upon the Statute of Edw. 6. for not setting out Tithes, if it is in the *Qui tam*, &c. it is naught, because the treble Value is given to the Party grieved, and the King can have no Benefit of it.

All the Precedents in Cases of this Nature begin with *Summons fuit ad respondendum to the Plaintiff*, and conclude, *per quod actio accrevit to him alone*.

Econtra.

These Exceptions were thus answered, (viz.) As to the first, it is sufficient to shew that the Plaintiff debito modo fuit Electus,

and he shall not be bound to show the cause of his action, but he shall show the Right to show, and he shall show the cause of his action, because the Action is brought against the Defendant for a Wrong done.

1. Then as to the next Objection concerning the Form of the Precept directed to the Sheriff to take the Defendant, and both parties by the Precept, and is not pertinent to the Defendant, but no Advantage shall be taken of this Objection, nor is it necessary if the Precept had been void of itself, because the Sheriff is bound to obey: It is like the Case of a Sheriff who levies Goods upon a Fieri Facias without a Return, and upon an Action brought against him, it will not be allowed that he took any Advantage of an irregular Precept.

But by returning say Brotherton, he hath admitted the Precept to be good, and when he took it as such, and executed it after a Wrong manner, he must be charged with an Action.

Neither is it necessary for the Plaintiff to show that he was chosen by Virtue of that Precept; for he alleges that he was chosen Loco Domini Colchester, and that is sufficient.

3. Lastly, as to the Objection, That in this Action the King ought not to be made a Party, the Form is well enough, for it is brought in the Qui tam, &c. for a Contempt to the King, who hath a Disappointment of a Member to serve in Parliament; And this was occasioned by a false Return, but, at the most, it is but Matter of Form and Surplusage.

The Statute 8 H. 6. gives an Action on the Case, and recites 8 H. 6. c. 7. Damages to the Party given, who by Conspiracy is indicted in any other County than where he dwelleth, and is acquitted; and yet such Action is brought Tam pro Domino Rege quam pro seipso.

So it is upon the Statute of Fine and Cry, and it is always so in Prohibitions, for there is a Fine due to the King for the Contempt to his Laws; and therefore it must be Tam pro Domino Rege, &c.

Note, Reader, This is not very clear, for no Penalty is given to the King by those Statutes, and in such Case a Fine is always for a Contempt; but here is a Penalty of 100 l. given by this Statute to the Plaintiff.

But to proceed. A Man was outlawed after Judgment, and arrested upon the Capias Velagatum, and escaped; and in an Action brought against the Sheriff, Tam pro Domino Regina, &c.

this has allgates for the King, but always good; for it is a Contempt of the Queen to suffer a Person outwitted to escape.

Curia. This Precept is well enough, for it commands them to chuse Burgesses de eodem Burgo; which is no more than what the Law was before the making this Act.

As to the Form of this Action, that it is brought Tam pro Domino Rege quam pro seipso; it is true, where a Statute gives Damages to the Party injured, as for Instance, the Statute of R. 2. for a Scandalum Magnatum, it is usual to join the King with the Party; but where a Sum certain is given, as in this Case, they need not be joined. So upon the Statute of Hue and Cry they are always joined.

Raft. Ent. 193.
2 R. 2. § 1.
cap. 5.
12 R. 2. c. 11.
Coke Entr.
349.

But here is a Contempt made by the Defendant to an express Law, which is punishable by Fine, and therefore the Action may be brought Qui tam, &c. There was the like Precedent in this Court, between Culliford and the Mayor of Dorchester, Anno 3 Wilhelmi, which was an Action of Debt upon a false Return in this very Form. Sed Adjourn.

Vide Post. 367.
Comber. 19.

Hackshaw versus Clerke.

AN Action on the Case was brought upon a Bill of Exchange; to which the Defendant pleaded, That after the Acceptance of the Bill he gave a Bond in Discharge thereof; and upon Demurter to this Plea, it was objected, That it amounted to the general Issue, for the Debt upon the Bill being extinguished by the Bond, the Defendant ought to have pleaded Non Assumpsit, and to have given the Bond in Evidence; and the Court seemed of that Opinion; but by Consent, the Defendant did plead the general Issue.

177.

Rex versus Owen.

Mandamus to shew Cause why the Defendant did not deliver the Gate, and other Emblems of Royalty, to one Bennet, the succeeding Mayor, &c. in which Writ the usual Clause, Vel Causam nobis significetis, was left out; and upon a Motion made to quash the Writ, it was argued, That those Words were so material, that they could not be omitted; and it was compared to a Precept quod reddat for Land, or a Precept quod reddat rationabilem computum. Which Writs must always conclude thus, Vel offensurus quare non fecerit, &c.

Vide 2 Jon.
177.
Comber. 399.
S. C.
Skin. Rep.
669. S. C.

But

But on the other Side, the Case of the King and St. John's College was remember'd in this Court, where the same Writs were left out of a Mandamus, the Writ concluding such information; and the Court would not quash it, because it being a mandatory Writ, the Person to whom it is directed ought to make a Return, or obey it, and it is not absolutely necessary that these Writs should be inserted. They were first introduced in James Bagge's Case, but have been omitted in many Cases since, and therefore a Pluries Mandamus was now granted.

Blanchly *versus* Fry.

S. C. 1 Salk.
193.

TRESPASS quare Clausum fregit, and for cutting and carrying away his Corn; the Jury found the Defendant guilty of breaking the Close and cutting the Corn, but not of the carrying it away, and gave 10s. Damages.

And now it was moved in Arrest of Judgment, the Question being, Whether this Case was within either of the Statutes, which give no more Costs than Damages?

43 Eliz. c. 6.
22 & 23
Car. 2. c. 9.

The Statute of Queen Eliz. enacts, That if upon any personal Action to be brought in the King's Courts at *Westminster*, not being for any Title or Interest of Lands, nor concerning the Freehold of any Lands, nor for any Battery; it shall appear to the Judge who tried the Cause, and so signified by him, that the Debt or Damages recovered shall not amount to 40s. or above, that he shall not award for Costs more than the Debt or Damages recovered.

The Statute 22 Car. 2. recites that former Statute, and enacts, That in all Actions of Trespas, Assault and Battery, and other personal Actions, wherein the Judge at the Trial of the Cause shall not certify upon the Back of the Record, that the Assault and Battery was sufficiently proved, or that the Freehold or Title was chiefly in Question; if the Damages found be under 40s. the Plaintiff shall have no more Costs, and if more shall be awarded, the Judgment shall be void; and the Defendant may have an Action for such vexatious Suit.

In this Case, the Freehold or Title of the Land was not in Question, the Action being brought against a Gentleman for entering into the Plaintiff's Ground, who was then following his Game in Hunting.

But it was said, That in a like Action for breaking and entering a House, and breaking the Plaintiff's Glass Windows, and disturbing him in his Possession, the Plaintiff had Judgment

2 Vent. 215.

Fragil. 42,
43.
Comber. 75a
222, 324.
399, 400.
Skin. Rep. 666.
Mod. Cases in Law and Equity, 2nd Ed. 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Vide 1 Jost.
121, 122.
Post. 402,
403, 431.
Scur. 7 & 8.
W. 3. c. 27.
Stat. 11 & 12
W. 3. c. 17.
Comber. 419,
430.
Return to a
Mandamus,
That the Party
had not taken
the Oaths.
Jones 121.

Le Roy versus Slafford.

Mandamus issued by the Mayor and Commonalty of the City of Oxon, to admit S. to be their Town-Clerk. They return, That he had not taken the Oaths according to the Statute 13 Car. 2. cap. 1.

Exceptions to this Return.

Levins. They have not returned, they did not administer the Oaths to him, which they would have done, for no Man can give himself an Oath; so that it was a Duty incumbent on this Corporation to have tendered the Oaths to all their Officers, and all Oaths must be tendered by some Person that had lawful Authority to tender them; and for ought appears, he might refuse to take the Oaths, and they would not give them.

Harcourt. This is an Officer removable at Pleasure by the Mayor and Commonalty, and if they have a Power to remove him, and act in Pursuance of that Power, the Court will not grant a Mandamus to have him restored. So is 1 Sid. 14. Vent. 77.

But with Submission, there is very little in Mr. Serjeant's Objection, for the Party is bound at his Peril to take these Oaths. And you may as well say, That upon a Return of 25 Car. 2. it must appear, that the Baron tendered the Sacrament; as to say, the Corporation is bound to tender the Oaths.

Chief Justice. Though a Man that does but an Office may be removed without Cause, yet the Corporation here has not declared their Will to remove him; which they shall do, or else we cannot take Notice of it.

But the Will of the Officers is very positive, That at the Time of the taking the Oaths of his Office, he shall take the other Oaths, and subscribe the Declaration. The Case of the King and Thacker in 22. Thomas Jones, Case 121. is plain against you: A Mandamus issued by the Mayor, &c. of Norwich to

to return an Alderman; they return'd, that he being elected, took the Oaths in the said Act of 1 W. 3. and of King Ch. and pronounced the Declaration, but he did not subscribe when he took the Oaths to execute the said Office. Counsel excepted to the Return, because it does not appear that he was required to make the Subscription, or that the Declaration was tendered to him to be subscribed, and the Act requires Tender, and the Proviso refers to it; But the Court held that Tender is not necessary, and the Officer ought to do it at his Peril, and the Office is void for Non-subscription by the Words of the Act; and the said Cause was allowed by the Court.

Indeed, if the Mayor and Commonalty should refuse to administer the Oaths, it is a great Misdemeanor, for which an Information will lie, and it is punishable. And consider whether an Action will not lie against the Mayor for not tendering these Oaths for Damages in losing the Place by it, for they ought to have tendered them; and the Words of the Act are, That the Oaths shall be administered: But however, the Party must take them at his Peril, the Words of the Statute are strong against him.

Refusal to
administer
the Oaths.

At another Day,
Webb. My first Exception to the Return is, That they have made it narrower than it ought to have been; for they say, That he did not take the Oaths before the Mayor and Commonalty; but they do not say he did not take them before two Justices of the Peace: So that for ought appears, we might have taken them before two Justices of the Peace, and then we have a good Title; and a Return must be certain to every Intent, for we have no Opportunity as in Pleas in Bar we may reply, and therefore there need not be so very certain.

2d. Exception. They do not give us Negative Words, they do not say we had not no better Title, for they only give us a defensible Title; but they ought to have added, we have no other Title, for perhaps he might have been chosen afterwards, and might have had another good Title.

Contra.
Shower. As to the first Exception, we have said, That he did not take the Oaths when he was chosen to this Office, and that is sufficient, for that implies he did not take them then before any one: Besides, by the Act he ought to take the Oaths before the Mayor and Commonalty.

M m m m

As

As for the second, we have sufficiently alleged his having no Title. Then this Writ of Mandamus only concerns the Possession, and does not determine the Right; therefore the Return to it need not be so very certain.

Then the Words of the Statute are, That they are authorised to tender the Oaths, but not commanded to do it.

A Man at his Peril must take the Oaths in the Corporation Act.

Chief Justice. The Design of this Act was to secure the Government in general, and likewise of the Corporations in particular, therefore at his Peril he must take the Oaths, otherwise the Corporation, by Agreement amongst themselves not to tender the Oaths, might dispute with the Act, which might prejudice the Government.

Then the Question is, That two Justices of the Peace have Power to administer the Oaths in Case of Omission of the Mayor and Commonalty: If so, then the Return is too short.

At another Day.

Wright, Sergeant. The great Exception is, where it is said, That he ought to take the Oaths coram Magore pro tempore existens; so that it is wholly uncertain whether it was meant at the Mayor, before the Mayor at the Time of making the Letters Patents, or at the Time of making the Statute in King Charles II.'s Time, when the Statute was made to regulate Corporations, or at the Time of the late Act.

Northey. Though the Statute be misrecited, yet it being a Publick Act, your Lordship will take Notice of it.

As for the Exception, pro tempore existens, so much relied on, it shall be intruded before the Mayor for the Time being at the Time of taking the Oaths, it shall be understood eodem tempore when he took the Oaths.

Misrecital of a Statute.

Chief Justice. As to the Misrecital, if there be sufficient recited for the Plaintiff's Case, it is well enough. As in the Case of Robbery on the Statute of Hue and Cry, tho' the Plaintiff in Recital of this Statute omits [Murder] yet the Plaintiff will have Judgment.

Afterwards in Trinity Term following, a peremptory Mandamus was granted; for that by the 12th Paragraph, he might have taken the Oaths before two Justices of the Peace. If the Justices of the Peace have Power to administer the Oaths as well as the Mayor, and you have returned only that he did not take them before the Mayor, it is ill, and the Return is too short.

CLARK'S

CLARK'S CASE.

S.C. ante 156.

HALL. **T**HIS comes before your Lordship upon a Return to an Habeas Corpus: They set forth the Charter of the City of London, &c. and further say, That in the said City there are several Companies and Societies, and that the Company of Vintners is one of them, &c. and that those Companies are under the Government of the Mayor and Aldermen: And they say also, That if any refuse to take upon them the Office of a Liberyman of any Company, he might be thereof convicted and imprisoned by the Mayor and Aldermen; and they say, That Clark refused to take upon him the Office of a Liberyman of the Company of Vintners, that he was a Citizen and Freeman of London, and subject to the same, and that therefore the Mayor and Aldermen committed him to Fell the Mesper of Newgate, until he should take upon him the said Office.

Return on Habeas Corpus.

Comb. 411, 412.

Custom as to Liverymen, London.

1 Salk. 192,

193, 341.

352.

6 Mod. 123,

177.

1 Mod. 10,

164.

Ante 104,

105, 156,

157.

I think this Case to be of great Consequence to the Liberty of the Subject, which, my Lord Coke saith, is more precious than the Advantage of any particular Society. 2 Inst. 45, 46. 3 Inst. 124.

There have been many Exceptions taken already, and many Authorities quoted; and amongst the rest, the most remarkable are, 1 Mod. 10. and Tavernor's Case in Raymond 447.

Tavernor was chosen a Liberyman of the Company of Vintners, and refused, and they assessed a Fine of thirty-one Pounds eight Shillings and four pence, according to a By-Law. Per Cur': It is not unreasonable and against Law; were the Fine more or less, it would not make the By-Law void, for it is only to bind the Members of a Corporation; and when a Man hath agreed to be of a Company, he hath thereby submitted to the Laws thereof, and they are not to take Notice of the Extrajurisdiction of the Charges they lay upon themselves, and it is convenient to keep up their Reputation and the Honour of the City of London to have such Power.

Then it hath been already observed, that this Return is only by Way of Recital.

It shall now be returned to me: It hath not appeared he was chosen to be a Liberyman; for the Mayor [Recital] is not there.

2. Then

2. Then they ought to have alleged, That Mr. Clark had no reasonable Excuse; for that they entitle themselves to so supreme a Power of committing his Majesty's Subjects to Prison.

3. Then it does not appear that Mr. Fell was an Officer of the City. (This Exception was much insisted on in a former Argument in this Case.)

4. They ought to have asked Clark before the Commitment, What he had to say for himself? As the Practice is always in Criminal Cases,

Custom to
commit a
Man to Pri-
son.
Vide ante,
106, 107,
156, 157.

5. A Custom to commit a Man to Prison, is a good Custom. 2 Brownl. 191. The Case of the Cinque Ports. 1 Leon. 105, 106. 4 Leon. 109. Style 78, 84. 1 Roll. Abr. 364. Marsh. Rep. 186, 187. Langham's Case.

As for the Objection, That this Custom is confirmed by Act of Parliament; there are several Statutes that are adjudged to be void, which are unreasonable in themselves.

Then it does not appear in all this Return, that these Libertiesmen are of any Use to the good Government of the City, which should have been taken Notice of. 1 Mod. 164. Magdalen College Case.

Holt, Chief Justice. We ought as far as we can by Law to support the Government of all Cities and Corporations, especially this of the City of London; and if the Mayor and Aldermen should not have Power to punish Offenders in a summary Way, then farewell the Government of the City.

But the Exception which sticks with me most is, That it is not set out that Fell is an Officer of the City; and indeed I think not that he is an Officer of the City, quatenus a City, tho' I confess he is an Officer to the Sheriffs as he keeps the County Gaol: But it ought to have appeared, that he was committed to an Officer of the Mayor and Aldermen.

Clark was afterwards discharged per totam Curiam, though all the Court declared their Opinion, That the Custom was a good Custom, and was for the Advantage of the good Government of the City, and therefore they would always support it.

Rex versus Peckham.

ANNO 3 & 4 Willielmi, it was enacted, That if any one shall hunt, take in Toile, kill, wound or take away any red or fallow Deer, in any Forest, Chase, or Purlieu, Paddock, Wood, Park, or other Ground enclosed where Deer are kept, without the Consent of the Owner or Keeper, or shall be aiding or assisting therein, and shall be convicted either by Confession, or by the Oath of one or more Witnesses, before one or more Justices of the Peace where the Offence was committed, or Party apprehended; such Person being prosecuted within twelve Months after the Offence committed, shall forfeit twenty Pounds for every Offence, though no Deer is taken; but if killed, wounded, or taken, thirty Pounds for every Deer, to be levied by Distress, by Warrant under the Hand of that Justice or Justices, before whom the Conviction was made, one Third to the Informer, another to the Poor, apother to the Owner of the Deer or Park; and if no Distress can be had, then the Offender is to be imprisoned for a Year, and stand in the Pillory.

One Peckham was convicted upon this Act for stealing a Deer, which Conviction being removed into B. R. by Certiorari and filed, these Exceptions were made to it: *Vide 1 Salk. 378, 383.*

1. The Conviction being made upon this Statute, the Prosecution ought to have been within twelve Months, which it was not: For the Offence appeared to be done 14 August, 7 W. and the Information was exhibited 13 August, 8 Will. and not before. *2. The Statute is no Prosecution, and if so, the Party was not prosecuted within twelve Months after the Offence committed.*

To which it was answered, and so ruled, That the Record sets forth, that the Defendant debito modo & secundum formam Statuti convictus fuit, which is well enough. *Skin. Rep. 562. Carth. 501, 502, 508. 1 Salk. 383.*

The Inhabitants of Chidingfold versus Inhabitants of Penshurst.

AN Order was made by two Justices of Peace, to remove a poor Man from the Parish of Chidingfold to Penshurst, which Order was confirmed upon an Appeal.

N n n n

I. And

Vide 6 Mod. 180. Post. 322, 325, 330. Anre 149, 162, 208.

S. C. 2 Salk. 473, 474.

14 Car. 2.
c. 12.
Ca. in Law
Equ. 26, 389,
390.
Comb. 200,
339, 314,
400.

1. And now a Motion was made to quash the first Order, because it did not shew that the Poor settled in a Tenement under the yearly Value of ten Pounds.

2. The Statute enables two Justices of Peace to remove the Party, one of whom is to be of the Quorum, which Word was omitted in that Order.

The Court disallowed the first Exception, which was the same formerly over-ruled, in the Case between the Inhabitants of Marlborough and Wootton Rivers.

But the Order was quashed for the other Exception, the Court being of Opinion, That two Justices cannot remove a poor Man out of Sessions, unless one of them is of the Quorum, because they have a special Jurisdiction given by the Act, which must be followed. 2 Salk. 474.

Parish of Walton v. Parish of Chesterfield.

Vide post.
315.
Ante, 149,
163, 204.

Nota. A NOTHER Order was made, to remove a poor Man from the Parish of Walton to Chesterfield in the County of Derby, which was likewise confirmed upon an Appeal: But the first Order was not quashed, because it did appear to be made by two Justices of the Peace, it is only, Whereas Complaint hath been made to us, and so they did not recite their Authority in the Order. It is true, they were mentioned to be Justices upon the Appeal, but that will not help, for they might be so then, and not at the making the first Order, and for this Reason it was quashed.

The Inhabitants of Chidlingfold v. The Inhabitants of Pennine. DE

A Motion was made by the Justices of Peace of the Parish of Chidlingfold in the County of Surrey, to remove a poor Man from the Parish of Chidlingfold to the Parish of Pennine in the County of York.

D E

Term. Sancti Hill.

Anno 8 Will, 3. B. R. 1896.

Memorandum. This Term Serjeant *Wrights* was called within the Bar, being made King's Serjeant, and afterwards Lord Keeper of the Great Seal.

Mrs. BARNEY'S CASE.

A BILL of Indictment was found against her at the Quarter Sessions in Norwich, for Petty Treason and Murder of her Husband. She came now in Custody, and moved the Court, by her Counsel, that she might be bailed. It is true, this Case is not within the common Rule; but it appearing, by Affidavits of the Fact, that it was a malicious Prosecution, and there being nothing done either upon the Indictment or Coroner's Inquest, or at the Assizes, and the Man being dead above a Year, she was bailed.

Vide 2 Jon.
210, &c.
Post. 455.
Comb. 6, 111,
405. S. C.
Hale's P. C.
2d part, 131,
139, 140.
Hawk. P. C.
2d part, c. 15.
§. 40.
Skin. Rep. 56.
Ca. in Law
and Equ. 334.

Redwood v. Coward. Trin. 8 W. Rot. 645.

WRIT of Error upon a Judgment for the Plaintiff in the Palace Court. The Error was assigned in the Judgment itself; for it was, That the Jury Assident damna, instead of Assidant, it should have been in the Present Tense; it is like Recuperet damna, instead of Recuperet, which cannot be good.

Now tho' both these Words may have the same Signification, as Concessum est is the same with Consideratum est, &c. yet Usage had made the Word Assidant to be the proper Word in such Cases.

Comb. 398,
466, 479.

To which it was answered, That Assident is the most proper Word, for it comes from Assideo, to doth Asseser; and the Jury are the Assesors of the Damages.

Curia. And the Court was of the same Opinion, but would not allow Concessum and Consideratum to be the same: for it may be Concessum, and often is without Consideratum.

Salisbury versus Proctor.

Vide Sty. 31,
224, 227.
1 Sid. 60, 98.
Nelf. Lurw.
478.
Mar. 60.
Cro. Jac. 169.
Palm. 393.
Larch. 216.
Ante 181.

IN Trover the Plaintiff declared, That he was possessed of Divers Goods, viz. of fifty Pieces of Gold coined within this Kingdom, ac de Viginti petrat Carnis Bovina, [Anglice then: a Stone of Beef] ac de viginti Vafibus [Anglice wooden vessels] as his proper Goods which he lost, quæ quidem Bona & Cattalla postea apud, such a Place, ad Manus & Possessionem of Defendant per invention. debuerunt.

There was a Verdict for the Plaintiff, and Intice Damages given. And now it was moved in Arrest of Judgment, and these Exceptions were taken:

1. He hath declared, That he was possessed of fifty Pieces of Gold coined within this Kingdom, but doth not name what money it was; for which Reason it is uncertain; for Pieces of Gold are coined here of several Values.

Carth. 132.
Comb. 306.
Stia. Rep.
142.

2. That he was possessed de Viginti petrat Carnis Bovina. But there is no such Word as petrat which signifies a Stone of Beef; and there is a proper Word for a Stone of Weight: And the Rule is, when an improper Word is put in the Declaration, for which there is a proper Word to signify the same Thing, it is always held to be naught.

Vide 1 Sid.
60.
1 Lev. 48.
Nelf. Lurw.
478, 480.

3. That he was possessed de Viginti Vafibus, [Anglice wooden vessels]; the Word Vas is too general: So de un Pollo hath been held ill for the same Reason.

4. It is said, these Goods ad Manus of the Defendant per invention. debuerunt, instead of devenerunt; for which Reasons this is not a good Declaration.

Contra.

The Archdeacon hath not an Authority to refuse a Church-warden being chosen; for if such Power should be allowed, the Custom of choosing him will be quite destroyed. The Parishioners are the proper Judges of his Qualifications; and the Archdeacon hath no more to do than to administer the Oath, and admit the Person chosen; and is no more a Judge in this Case, than he is of an Executor or Administrator.

The Party refused cannot bring an Action upon this Return to try the Right; for to say, Non fuit pauper Lactarius, would be very incertain, because he may be poor in several Respects, and yet not thereby disabled to hold this Office.

Econtra.

The Question is, Whether the Person who by Law is to administer the Oath of Office, hath any Power to judge of the Ability of the Person chosen to such Office?

The Office was Spiritual; therefore the Ecclesiastical Court is not only to swear him, but is likewise to judge of his Ability; he is presented to them for that Purpose. They have a formal Proceeding to examine his Sufficiency, and their Determination, that he is Minus Habilis, must always be allowed where they have any Jurisdiction of the Cause.

A Church-warden is an Office of Trust; he is made Overseer of the Poor by the Statute of 41 Eliz. without any Election; he is accountable to the Parishioners at the Expiration of his Office; and therefore Care ought to be taken that he should be Habilis & Idonea Persona.

But the Court were of Opinion, That a Church-warden is a Temporal Officer; that he is a Corporation; and Actions are brought in his Name, and likewise against him by his Successor, to render an Account.

He being then a Temporal Officer, and having a Temporal Trust reposed in him, and there being a Custom for the Parishioners to choose him, it is the Duty of the Archdeacon to swear him when chosen, without inquiring into his Ability.

For why should he be Judge of that, rather than those who are most concerned in Interest, which are the Parishioners? And it is not to be presumed, that the Archdeacon will take more Care to put a fit and able Person into this Office, than they in whose Power it is to choose him: And for this Reason, the peremptory Mandamus was granted.

43 Eliz. c. 2.
Mod. Ca. in
Law and Equ.
1st part, 325.

Comb. 417.
S. C.

1 Salk. 166.
Carth. Rep.
118.
Hard. 378.
Raym. 439.
1 Vent. 115.

College of Physicians *versus* Salmon.

BY the Statute Anno 14 H. 8. the Charter is confirmed, by which the College of Physicians is incorporated: which made them a perpetual College in London, and seven Wives Comptrols thereof, with Power to chuse a President every Year. It enables them to purchase Lands, and to sue and be sued; and prohibits any to practise Physick within that Circuit, unless approved under the Seal of the College, upon Pain of 5 l. to be divided between the King and the College.

R. C. 2 Salk.
451.
Vide 4 Mod.
47.
6 Mod. 44.
Stat. 14 H. 8.
cap. 5.

Ca. in Law
and Equ. 353.
354.

An Action of Debt was brought upon this Statute by the Plaintiff, by the Name of Præfident & Collegium seu Communitas Facultatis Medicinæ London, against the Defendant, for practising Physick without Licence: Per quod Actio accrevit Domino Regi & Dom' Reginæ & eidem Præfidenti qui tam Collegio & Communitate, &c. Upon Demurrer to the Declaration.

It was insisted, 1. That the Action was misconceived, for it ought to be brought by the President of the College of Physicians only. So is Dr. Laughton's Case, who brought an Action as President of the College of Physicians in London, and of the Corporation of Physicians there; for the President and College being incorporated, they ought to join in the Action; it had been naught if the Action had been brought in the Name of the President alone without the College.

Dr. Laughton
ver. Gardner.
Cro. Jac. 121,
129.
1 Roll. Abr.
515.
2 Bull. 185.
Corporation
of Physicians
versus
Dr. Tenant,
Jones 262.

2. The Statute prohibits the Practice of Physick within seven Wives of London, unless the Person so practising be approved under the Seal of the College, under the Penalty of 5 l. to be divided between the King and College.

They alledge, that the Defendant did practise within that Circuit, not being admitted under the Common Seal of the President and Commonalty, when the Statute saith, It must be by the President and College, five Communitas; and by the Statute the Penalty is given to the King and College, which is not the same Person.

3. The Conclusion is, Per quod Actio accrevit Domino Regi, &c. & Præfidenti qui tam, &c. Collegio five Communitate, &c. when it should have been brought by the Informer; Qui tam pro Domino Rege quam pro seipso.

Cro. Car. 256.

Econtra.

The Statute of King William is explanatory of the former Laws made about Settlements; and the Party must now bring himself within that Act, or can gain no Settlement: 3 & 4 W. & M. cap. 11.

That Act requires, That if an unmarried Person, not having Child or Children, be lawfully hired for a Year, such Service shall be a good Settlement. Now that must be a Service for a Year.

This was no lawful Hiring, for it does not appear that he was retained by his own Consent; and an Action would not have lain against him upon his Departure out of his Service, because there was no mutual Contract between the Master and Servant.

The Agreement was made between Sir Paul Jenkinson, and the Master, who was bound only to teach the Boy to trade. F. N. B. 168. B. Lit. F.

If this should amount to a Contract between them, it must be as an Apprentice, which cannot be, because not by Indenture, and therefore void.

If he had been an Apprentice, it must be for seven Years, and then his Trade is accounted an Estate, which is a Security to the Party. Adjourn.

This Case was spoke to again in Easter Term following, and it was insisted, That the Order of Sessions upon the Appeal was final; but afterwards in Trinity Term, the Court held this to be no good Settlement in Chesterfield, and that the Person was well removed to Walton. Carthew 400, 401.

Rex versus Turner.

S. C. 2 Salk. 474.

AN Order was made at the General Sessions of the Peace, held for the County of Wilts, by which the Defendant was assessed towards the Relief of another Person, by Virtue of the Statute of 43 Eliz. and was indicted for disobeying that Order; which being removed hither, this Exception was taken to it, 43 Eliz. c. 2. 2 Salk. 474, 476. Comber. 418. *1. The Order is said to be made Ad generalem Sessionem Pacis tantum, &c. and doth not say, Quateriale; when it is expressly required by the 7th Paragraph of that Act, That the Relief shall be at the Justices of the Peace at their general Quarter Sessions shall assess: For which Reason it was quashed.*

P P P P

Dilbury

Dalbury and Foiston Parishioners.

Vide 2 Salk.
533, 534,
535, 536.

AN Order was made by the Justices of the Peace, to remove one Robert Blood, from the Parish of Foiston, in the County of Derby, to the Parish of Dalbury, being the Place of his Birth.

1 Jac. 2.
c. 17.
Notice.

The Inhabitants of Dalbury appeal to the Quarter Sessions, and the fact was stated upon the Order, *sc.* That he lived at Foiston a whole Year, and being a Smith, worked for the Lord of the Manor, and the Vicar of the Parish, in shoeing their Horses, which was held to be a sufficient Notice; and therefore the Order was confirmed upon the Appeal, though no Notice in Writing was given to the Church-wardens and Overseers of the Poor of the said Parish of the Place of his Abode, and the Number of his Family.

Vide post.
454.

These Orders being returned hither by Certiorari, it was moved, to affirm the Order made upon the Appeal, and said, That Settlements will be as formerly before the making of that Act, unless the Party comes clandestinely into the Parish, which was not done in this Case. So that having lived at Foiston above forty Days, he is now legally settled in that Place.

The greater Part of the Parish requested this Man to inhabit there, because they wanted a Smith. Therefore since he came thither at their Desire, and openly, the Statute will never extend to him; because that was made to prevent the concealing themselves above forty Days to gain a Settlement.

It hath been held in this Court, That where the Parishioners of Grampound met at a poor Man's Alehouse to make a Rate, that did amount to Notice, though no such was given in Writing; and it was allowed a good Settlement after the forty Days.

Econtra.

But on the other Side it was said, he was no Householder, but lived with the Widow of the former Smith in that Parish, and worked there as her Servant.

The Intent of the Statute was, That by giving Notice in Writing, the Parish may know as well the Number of his Family, as the Place of his Abode; but neither the Lord of the Manor, nor the Vicar, can tell how many this Smith had in his Family by shoeing their Horses.

The

The last Statute seems to be made purposely to prevent such Settlements, which enacts, That the forty Days shall be accounted from the Publication of Notice in Writing of the Place of his Abode, and Number of his Family; which he shall deliver to the Churchwarden, &c.

Vide Stat.
3 & 4 W. &
M. cap. 11.
2 Salk. 523,
534

By which Statute, several Things are allowed to make a Settlement without Notice in Writing.

As if a Man execute a publick Office for a Year, or shall be charged with publick Taxes to the Parish, or unmarried Person hired for a Year, or Apprentice, &c.

Cases in Law
and Equity,
14, 15.

Since the making this Act, it hath been adjudged in this Court, That if a Man be assessed to the Parish Rates, and doth not pay the Sum at which he is assessed, that shall make no Settlement; and yet in the Case of Ipswich it was held, that if a Man be assessed to the Land-Tax, it amounts to a sufficient Notice, and yet it is no Parish-Tax.

Inter Pari-
shioners of St.
Hellen and St.
Nicholas in A-
bingdon.
Mod. Cases in
Law and E-
quity, Part 1.
38.

Coria. Notice by Implication will defeat the last Act, which is explanatory of the Statute of King James, and must be pursued; for the Court cannot go beyond that Explanation. So the first Order was confirmed.

Comber. 410.
S. C. 382.

D E

D E

Termino Paschæ.

Anno 9 Will. III. in B. R. 1697.

S. C. 1 Salk.
48.Pulston *versus* Warburton, & al.Vide 1 Sid.
316, 416.
Ray. 165.

IN Ejectment, the Declaration was of Trinity Term last past, upon the Demise of John Levett and Anne his Wife, for Lands in Blymhill, in the County of Salop, dated 10 April, 1697, and the Ouster is laid to be, Postea, scil't, eodem decimo die Aprilis 1697.

Comber. 394.
395.
S. C. 83.

The Defendant's Attorney entred into the Common Rule, to confess Lease, Entry, and Ouster, and to try the Cause at Bar; and the same was tried accordingly last Michaelmas Term, which was in the Year 1696, and which was half a Year before the Plaintiff had any Title, as appeared by the Declaration; whereupon the Defendants moved to stay the Entry of the Judgment: He had a Verdict the same Term the Cause was try'd, by Reason of this Mistake of the Year of our Lord in the Demise, which should have been 1696, instead of 1697, and they had a Rule accordingly. And the first Day of the last Term, the Defendants moved it again, and the Rule was continued till the Plaintiff should move the Court, which he did by Serjeant Wright last Term, to amend the Declaration, and make the Demise to be in the Year 1696, instead of 1697.

The

The Declaration delivered to the Tenant in Possession was right, and a full Defence being made at the Trial, the Judgment may be well entered, notwithstanding this Mistake; and this is warranted by the Statute of Repleader, which enacts, That in all Actions after Issue join'd, Judgment shall be given, notwithstanding any Mispleading, Lack of Colour, insufficient Pleading, Miscontinuance, Discontinuance, or Misconveying of Process, Misjoining of Issue, &c. or any other Default or Negligence of any of the Parties, their Counsellors or Attornies; which are large and general Words, and will not justify the Amendment in this Case. 32 H. 8. c. 30.

This Court hath * changed the Plaintiff in Ejectment after the Declaration delivered, he being a Witness to prove a Deed in the Cause. Sid. 24.
* But it was before Plea pleaded.

It hath likewise enlarged the Term where the Cause hath been long in Agitation, and it was never denied to amend where there is any Thing to amend by.

An Ejectment is an Action brought by Consent, and more immediately under the Power of this Court than any other Action, for it is a Matter of Form set out by the Court.

Now the Declaration below, against the casual Ejector, being right, that being in Nature of an Original, in whose Room the Defendants are to come in by Rule of Court.

It is plainly the Misprision of the Clerk; and therefore it may be also well amended within the Statute of H. 6. especially when the Amendment is in Affirmance of the Judgment. 8 H. 6. c. 15.
Skin. Rep. 591.

Birch Serjeant, Sir Francis Winnington, and Sir Thomas Powys, contra.

If by these general Words in the Statute of H. 8. every Thing may be amended as it hath been argued on the other Side, then all Motions in Arrest of Judgment would be vain, and to no Purpose; because, let there be never so many Errors, either in Title, Substance, or Form, they may be all amended; but the Practice is otherwise.

As to the Reason offered, why the Court should make an Amendment in this Case, because they have altered a Plaintiff in the same Action, that can be of little Force; for it is not material who is Plaintiff in Ejectment, for he is only a nominal and imaginary Person: And therefore Judgment shall be entered against him after he is dead, because he is not concerned in Interest. Carth. 401,
402. S. C.
Mod. Rep. 252.

This Bill was seen before the Trial, and the Plaintiff moved the Court twice, but they would not alter it, but yet he proceeded to try the Cause, and would not have the Court make a new Record, a new Lease, and a new Quiler, which could not be done without the Consent of both Parties.

All Amendments extend to Forms and Mistakes of Clerks, but not to Titles and Substance as this is.

That the Court should give Leave to amend this Declaration, because they enlarged the Term where the Cause hath been long depending. Certainly, that can signify but little to this Purpose, because where Difficulties arise, Curia advisare vult for two or three Years together, rather than give a hasty Judgment. Now that is the Act of the Court, and no Default of the Parties, therefore they may well enlarge the Term.

It cannot be said with any Colour of Reason, that this Action is more under the Power of this Court than any other; for Proceedings in Ejectment are as regular as any other Cases whatsoever.

In the Case of Thompson and Leach, an Ejectment was brought for so many Acres Ligni, but the Court would not amend it, and put in the Words Baci; and therefore the Plaintiff having declared of several other Things, Care was taken to separate the Damages by the Verdict.

Now this being Matter of Substance, it cannot be amended by the Statute of H. 6. because that doth not extend to this Case, for it must be after Judgment, and in Affirmance of the same; and this Motion is made in Arrest of Judgment.

The latter Statutes do not extend to it, but only Matter of Form, so that it will be difficult for the Plaintiff to shew any particular Provision in those Acts to suit with this Case.

1 Show. 337.

This Court denied to enlarge the Term in an Ejectment between Hutchins and Ballet, which was hung up many Years by Privilege of Parliament.

22 H. 6. 8.
Bro. Amend-
ment 41.

This is not the Election of the Clerk, and therefore it cannot be now amended in another Term. So was the Law formerly held to be in an Action of Trespass, for breaking the Plaintiff's Close, and carrying away his Goods; which Words were left out of the Declaration. This was not allowed to be amended in another Term, for the Plaintiff is to declare at his Peril.

* Pasche,
21 Car. 2.
1 Sid. 416.

Neither can the Case of * Pemble and Stern be an Authority to govern this; it was a special Verdict in Ejectment, and an Exception was taken to the Declaration, because it was of a Park, without saying how many Acres, & de Panhagio, of which an Ejectment

Ejection would not lie: That the Court being divided upon another Point, a Rule was made to adjourn to into the Recorder's Chamber, and before the Recess was certified, Sir William Wyndham, one of the Justices against the Judgment for the Plaintiff's side, and then there being but three Judges in Court, a Motion was made for Judgment, according to the Opinion of the other two, Kelynge and Twicken, the Plaintiff having released the Damages for these Things without the Consent of the Defendant, which could not be done by Law; and it being opposed by Weston, who was of Counsel with the Defendant, yet at last he consented to it, because he saw these two Judges would otherwise give Judgment against his Client.

Cholmondley *versus* Broom.

DEBT upon Bond was brought against the Defendant in this Court in Custod' Mar', who pleaded, That about the Time of the exhibiting the Bill, he was an Inhabitant in the County-Palatine of Chester, &c. *apud* Nantwich, and not otherwise known there.

Comb. 319.
Carth. 11, 12.

Now this being held to be a Foreign Plea, and not sworn, the Plaintiff for that Reason signed his Judgment.

Mr. Cheshire moved to set it aside, because that it is a Plea to the Jurisdiction, yet it is not a Foreign Plea, and therefore need not be sworn.

1 Salk. 30,
201, 202.
Vide 2 Salk.

Antient Demesne, and all Pleas of Privilege, are Pleas to the Jurisdiction; but they are not foreign, and therefore they are to be received without an Oath.

515, 543.
544.
Lutw. Rep.
236.
Styl. 225.
Sid. 329.
1 Sann. 97,
98.
Comb. 582.
Carth. 402.

Many Instances may be given of Foreign Pleas, which if not collateral to the Action, must be received in that Manner: As in an Action of Debt for Money, if it appear upon the Condition of the Bond, that it should be paid out of the Jurisdiction of an Inferior Court, and the Defendant pleads Payment accordingly, this Plea must be received without an Oath: And for this Reason the Judgment was set aside.

Rex *versus* Jevois.

ACT at Bar in a Quare Impedit, for the Church of Northfield, setting forth, That John Webb, late Prior of the dissolved Monastery of St. James the Apostle, of Dudley, in the County of Worcester, was seized of the Advowson of the said Church

Quare Impe-
dit.
Vide ante
297, 298, &c.

Church in gross as of Fee in Right of his said Priory, and that he and his Convent did, on the 9th of June, 21 H. 8. grant the next Presentation thereof to Ralph Bradley, and others, under their Common Seal.

27 H. 8. c. 8.

That by the Statute 4 Feb. 27 H. 8. the Priory was dissolved, not having above the clear yearly Value of 200 l. per Annum; and the Possessions thereof were given to the King and his Heirs.

That H. 8. died seized, and it afterwards came to Queen Mary, and so on to Queen Elizabeth.

That Ralph Bradley, the 14th. of August 1558, which was in the last Year of Queen Mary, granted the next Presentation to Sir Richard Levingston, and Edward Levingston, Esq; that Sir Richard died, and Edward Levingston survived, and was sole possessor.

That Queen Mary died seized of the Abbotsdon, and the Church became void by the Death of Richard Walker, and that Edward Levingston presented Henry Esquire, who was instituted and inducted.

That Queen Elizabeth died without Issue, and the Abbotsdon of the said Church descended to King James I. and so derives a Title to his present Majesty; and that the Church being void, it belonged to him to present.

The Defendant pleads, That Bene & verum est, that King James was seized of the Abbotsdon in gross as of Fee, prout in the Declaration; but that he by Letters Patents under the Great Seal, dated the 11th of July, in the 13th Year of his Reign, granted the same to Sir Charles Montague, and Edward Sawyer, and their Heirs, the Church being then full of the said Henry Esquire.

That they, 15 July, in the same Year, granted it to Edward Skinner, and his Heirs; that Skinner afterwards levied a Fine to Sir Thomas Jarvois, and declared the Uses thereof to the Cognizee, and his Heirs.

That Sir Thomas Jarvois, 30 March, 4 Car. 1. granted the next Presentation to Phineas White; that the Church became void by the Death of Esquire, and that Phineas White presented Timothy White, who was instituted and inducted.

That Sir Thomas Jarvois died seized, and the Abbotsdon did descend to Sir Thomas Jarvois his Son and Heir, and that the Church became void by the Death of White; he thereupon presented John Hinkley, who was instituted and inducted.

That

That Sir Thomas Jarvois died seized, and the said Advowson descended to the Defendant, being his Son and Heir; and that the Church being void by the Death of Hinkley, he presented the Defendant Hinkley thereunto, who was instituted and inducted, and traversed, that King James died seized of the Advowson aforesaid, *Modo & forma prout Attorn. general. præd. Dom. Regis nunc per Narration. suam præd. superius allegavit, protestando quod Sir Thomas Jarvois deceased, and the Defendant Jarvois, were successively for the Space of sixty Years, and more, before this Writ brought, seized of the Advowson in gros as of Fee, and that Henry Esquire died about sixty Years before the Writ brought; for Plea saith, That Bene & verum est, that King James was seized, and derived a Title to the Defendant Jarvois, absque hoc, that the Church was void by the Death of Henry Esquire.*

The Attorney General took Issue upon the Traverse of Jarvois, which was now to be tried.

The Question at the Trial was, Whether the Defendant should give Evidence, and shew how this Advowson came out of the Crown? For having alledged, that Bene & verum est, that King James was seized; and induced his Title by a Grant from the King; and having traversed that the King died seized, &c. he ought to produce his Grant, and shew how it came out of the Crown; for the Seisin of the King being confessed in the Plea, *ex hoc sequitur, that he died seized.*

But notwithstanding this Confession in the Plea, the Court made the Plaintiff give some Evidence, that this Advowson was once in the Crown; who thereupon produced a Grant of the Prior made by him of the next Presentation, and the Priory being now dissolved, the Advowson of Consequence must be in the Crown.

Then the Defendant produced his Grant, which was by a Warrant from the Commissioners under the Great Seal, for confirming defective Titles.

It was insisted by the Counsel for the Plaintiff, That such Grant was not sufficient, because those Commissioners had not an Authority to make an Original Grant; they had only a special Authority given them to supply defective Titles, by confirming such Grants which were already made by the King.

This Commission, which is dated the 24 Feb. 1 Jacobi, is upon Record under the Great Seal; it is an express Authority given to certain Persons, and the Grant made by them is with reference to that Authority, for it is *Per Warrantum Comissionar*, therefore they must produce an actual Grant from the Crown. Now it appears, that the King was deceived, even upon the

R r r r

8 Rep. 55.
2 Lev. 171.
172.
3 Lev. 135.

Fitzgib. 308.
Comb. 308.
1 Rep. 45. b.
46. a. b. 48. 2.
49. a.
Skin. Rep.
659.
Carrh. 351.

very Record, which makes the Letters Patents void without a Sci' Fa' for he intended to grant nothing but what was in the Possession of the Party before, or for which he had some Colour of a Grant upon which the Commission was to operate.

Court.

But it was argued for the Defendant, That he need not shew a precedent Grant, because this made by the Commissioners was sufficient; for it shall be presumed, that the Commissioners did pursue their Authority; and the Possession having been in the Defendant, and his Ancestors, for sixty Years and upwards, and no Presentation since from the Crown, it shall never be intended that those Commissioners exceeded their Power.

And of this Opinion was the Court, especially since the Plaintiff could not produce any Evidence, that the King did present to this Living since the Dissolution of the Priory; and therefore it is possible that the Priory might grant away this Advowson before the Statute of H. 8. and it might be that Evidence was given of such a Grant to the Commissioners.

These Letters Patents were granted to Commissioners to quiet the Possessions of the People, whether the Crown had any Pretence or not.

The Plaintiff was nonsuit.

Brace *versus* Pennoyer.

S. C. 1 Salk.

319.

Vide Moore

367.

Comb. 441,

442. S. C.

21 H. 7. 16.

1 Salk. 264.

Carter 112,

293.

Skin. Rep. 82,

682.

2 Inst. 471.

Carr. Rep. 193.

Mod. Ca. in

Law and Equ.

1st part, 108.

Noy 150.

Carrh. 105,

236, 282,

283.

IN Trespass, there was a Judgment in the Common Pleas against three Defendants, who brought a Writ of Error in this Court; and before the Record certified, one of the Plaintiffs in Error died, and after his Death a Capias ad satisfaciend. was taken out against the other two surviving without bringing a Sci' Fa'.

The Question was, Whether there ought not first to be a Sci' Fac' because, as it was said, the Execution varies from the Judgment, and is not pursuant to the Record, because there was an Alteration of the Persons from three to two?

It is true, where one is not Party to the Record, as Heir, Executor, or Administrator, he can have no Execution without a Sci' Fac' tho' it be within the Year, because the Alteration of the Person altereth the Process.

But it is as true, if two Plaintiffs recover, and one die before Execution, the Survivor may take it out without a Sci' Fac' because he is Party and privy to the Judgment; and if it should

should happen that the dead Man had released the Judgment, the Defendant may bring an Audita querela, and be relieved. Vide : Salk. 264, 319.

It is true, if one of the Plaintiffs in Error had died after the Affirmance of the Judgment, there must be a Sci' Fa'.

In Replevin, three Defendants made Cognizance, &c. and a Verdict was given for the Plaintiff in Michaelmas Term, in the second Year of Queen Elizabeth; one of the Defendants died after the last Continuance, yet Judgment was given against the other two surviving without a Sci' Fa'. By which it appears, that Execution may be taken in this Case without any Suggestion made on the Roll, and without Application made to the Court. Dyer 175.

Curia. A Sci' Fa' is not necessary upon the Abatement by the Death of the Party; for what Dead is there of it, when the Party cannot plead to it?

If they plead for a Return of the Writ of Error, it will be certified; and without a Suggestion upon the Roll, he had no Means to know, that one of the Parties was dead. Vide : Lilly 2.

Therefore such a Suggestion ought to be made, and then to pray Execution against the Survivors, Et quia super Examination constat Cur', that one of the Defendants was dead; therefore the Court doth award Execution against the rest: And for this Reason a Superledeas was awarded Quia improvide.

DE

D E

Term. Sanctæ Trin.

Anno 9 Will. 3. B. R. 1697.

Rex versus Broom.

Vide 1 Salk.
31.
2 Salk. 440.
3 Lev. 351.
6 Mod. 13.
4 Mod. 176.
2 Lev. 27.
Ray. 489.
Comb. 462.
Show. 29.
1 Sid. 320,
367.
2 Samd. 260.
Skin. Rep. 59.
Raym. 473.

IN the Year 1691, the African Company hired the Ship called the America, whereof one John Broom was Master, who took a French Ship in the West Indies, and she was condemned there as Prize, and the Property was vested in the King. Afterwards Broom sold the Goods in Barbadoes, and then came home, and he was prosecuted in the Admiralty Court at the Suit of the King; upon which Prosecution there was a Sentence, and an Appeal was brought from that Sentence; and pending that Appeal, Broom moved for a Prohibition, suggesting; 1. That the Ship and Goods were taken in the West Indies, infra Corpus Comitatus, and so the Court of Admiralty had no original Jurisdiction of the Cause: And this was on Purpose to stop the Proceeding upon his own Appeal.

Comb. 120,
121, 366,
109, 135.
Carth. 26,
423, 398.
2. C. 474.

2. That the Property being once vested in the King, by the Condemnation of the Ship as Prize, there can be no Suit afterwards in the Admiralty Court here: For if after such Condemnation the Goods be converted, the King must bring an Action of Trover: And this is a plain Action of Trover upon the Face of the Libel.

To which it was answered, That this Ship was taken without any Commission, or Letters of Mart; and therefore it is a Perquisite to the Admiralty, and Broom is responsible to the King for the Ship and Goods.

There is nothing within the Libel upon which to ground a Prohibition.

First, they say, That the Ship was taken in the West-Indies, ^{3 Mod. 244, 1} infra Corpus Comitatus, which is not sufficient, for it ought to appear upon the Libel, that she was taken upon the Land beyond Sea, because this Court takes no Notice of Counties there, ^{245. 1 Lev. 243. 1 Sid. 367. 1 Roll. Rep. 80. 2 Bro.vnl. 34.} and no Prohibition after Sentence shall be granted upon a bare Suggestion, that the Captain was not super agram Mare.

That the Property is not vested in the King by the Condemnation, for that only declares it to be in him, for which he may afterwards sue in the Admiralty here, and tho' the Goods were sold at Land, and an Action might be brought at Law for the Conversion, yet the Original Cause arising upon the Sea upon which this Sale did depend, gives the Court of Admiralty Jurisdiction, for the Conversion was at Sea, tho' the Goods were sold at Barbadoes, and the first Motion he made towards the Place was a Breach of Trust, of which the Conversion at Land was an Evidence.

But it is too late to pray a Prohibition after Sentence, and an Appeal brought; for it would be a great Inconvenience to allow it after so much Expence, and no Exception taken to the Jurisdiction. This is a Reason given by my Lord Rolle in his Abridgment. As for Instance: ^{Roll. 2 Abr. 319. Friswell's Case.}

By the Statute 23 H. 8. c. 9. No Man is to be cited to appear out of the Diocese where he liveth, except, &c. upon Pain of double Damages to the Party grieved, and ten Pounds to the King.

A Suit was commenced in the Prerogative Court for a Legacy, and the Party had Sentence for it; and upon an Appeal from the Sentence to the Delegates, the Sentence was confirmed, and Costs taxed, and Excommunication for Non-Payment. Now the Executors would have a Prohibition upon the Statute, because they dwelled in another Diocese; but the Court granted a Condemnation because they came too late for a Prohibition, having so long allowed the Jurisdiction of that Court. Adjourns. ^{Cro. Car. 97. Smith versus Executors Poyndrell. Vide 3 Cro. 686. Skin. Rep. 299. Cases in Law and Equity, 439.}

Rex versus Holroy.

THE Defendant was indicted for concealing Treasures unknown, and buying Clippings. He was found guilty, and brought a Writ of Error, and assigned for Cause, for that there was a M^{is} instead of a Capiatur: And for this Reason the Judgment was reversed. ^{Hales's Pl. Cr. Part 1. 238.}

Rex versus Greep.

THE Defendant was convicted of Perjury at a Trial at Bar, upon an Information at Common Law, setting forth, That there was a Trial in the Common Pleas such a Term, between Richards Plaintiff, and Cornforth Defendant.

Quodque super triation. ill. per quosdam Testes adtunc & ibidem ex parte præd. Roberti Richards in causa præd. product. & adtunc & ibidem debito modo jurat. Juratoribus jurat. illius in evidenc. adtunc & ibidem dat. fuit quod præd. indentura barganiz & vendition. geren. dat. dicto decimo quinto Die Junii, Anno Domini Millesimo sexcentesimo octogesimo primo supradicto, necnon præd. indentur. relaxation. geren. dat. dicto decimo sexto Die Julii, Anno Domini Millesimo sexcentesimo octogesimo primo supradicto, sigillat. & deliberat. fuissent per præfat. nuper Ducem Albemarle tempore dat. earundem Indentur. apud tunc domum mansional. ipsius nuper Ducis Albemarle co'it vocat. sive cognit. per nomen de Albemarle-House que quidem Domus præd. decimo sexto Die Julii, Anno illo fuit situat. in Paroch. Sancti Martini in Campis in Com. Middlesex præd. quodq. quidam Richardus Strode, Armiger. temporibus sigillation. & deliberation. Inden-

tur. ill. fuit præsens in domo ill. cum præfat. Duce Albemarle & fuit Testis præd. sigillation. & deliberation. earundem, ac ulterius idem Coron. & Attorn. dicti Dom. Regis pro eodem Domino Rege dat. Cur. hic intelligi & informari quod adtunc & ibidem ad triand. ill. scilicet in præd. Octab. Sanctæ Trinitatis, Anno Regni dicti Domini Regis nunc octavo supradicto, apud Westminster præd. in Com. Middlesex in præd. Cur. ipsius Domini Regis de Banco præd. ibid. quidam Robertus Greep nuper de Paroch. de Plimpton S. Mariæ in Com. Devon. Yeoman, product. fuit Testis ex parte præd. Henrici Cornforth defend. in causa præd. & adtunc & ibidem jurat. fuit super Sacrosanct. Dei Evangelio ad dicen. veritatem, totam veritatem & nihil præter veritatem de & in præmissis in exitu inter partes præd. modo & forma præd. posit. quodque idem Robertus Greep Deum præ oculis suis non habens sed instigation. Diabolica mot. & seduct. adtunc & ibidem per actum & consensum suos falso, malitiose, voluntarie & corrupte super sacrum suum præd. dixit deposuit juravit & juratoribus Juræ præd. in Evidenc. de & concernen. præd. Richardo Strode dedit quod circa medium Julii [Anglice the middle of July] Octogesimo primo Mensem Julii, Anno Dcm. Mille-

lesimo

lesimo sexcentesimo octogesimo primo supradict. innuend. Magist. Strode præfat. Richardum Strode innuendo fuit apud Newnham (quandam Domum vocat. Newnham in Paroch. de Plimpton Sanctæ Mariæ in Com. Devon. innuendo) Et quod circa Medium Julii [Anglice July] Millesimo sexcentesimo octogesimo primo, eundem Mensẽ Julii eodem Anno innuendo Magister Strode eundem Richard. Strode iterum innuendo fuit apud Newnham dict. Dom. vocat. Newnham Paroch. de Plimpton Sanctæ Mariæ in Com. Devon. præd. innuendo & quod circa Medium Mensis Julii, Anno Dom. Millesimo sexcentesimo octogesimo primo Ma-

gister Strode ipsum eundem Richardum Strode iterum innuendo fuit apud Newnham (præd. Domum vocat. Newnham in Paroch. præd. de Plimpton Sanctæ Mariæ in dicto Com. Devon. iterum innuendo) ubi revera & in facto præfat. Richardus Strode circa medium dicti Mensis Julii, Anno Domini Millesimo sexcentesimo octogesimo primo supradicto vel ad aliquod aliud tempus quodcunque in dicto Mense Julii, eodem Anno non fuit apud Newnham præd. prout idem Robertus Greep super sacrum suum præd. falso malitiose voluntarie & corrupte dixit deposuit juravit & juratoribus ibidem Juræ præd. Eviden. dedit, &c.

Rex versus Greep.

THE Defendant was convicted of Perjury. And now it was moved in Arrest of Judgment :

1. For that it is not set forth, That the Oath was material to the Matter in Issue.

2. The fact is laid, That at a former Trial Mr. Strode gave Evidence, that the Indentures of Lease and Release were executed by the Duke of Albemarle, at Albemarle-House, about the Time of the Date thereof, which was the 16th Day of July, in the Year 1681, and that he was then and there present with the Duke, and was a Witness that the Duke did seal and deliver the same ; and the Perjury now assigned is, That the Defendant then depos'd, That about the same Time Mr. Strode was at Newnham, (Quand. Domum vocat. Newnham in Parochia Plimpton Sanctæ Mariæ in Com. Devon. innuendo.) Now the Alleges about which Time, are very uncertain ; for if he had depos'd, Mr. Strode was then at Newnham, without saying any more, it must be agreed that had been uncertain ; for it doth not appear where Newnham was,

S. C. 2 Salk.
513.

Vid. Post. 348.
Comber. 456,
469.
Carthew 421.
S. C.

Cases in Law
and Equity,
197, 198.
Hob. 6.
4 Co. 17.
1 Roll. 78.
1 Cro. 321,
378.
Allen 32.
Yelv. 21.

was, or that it was Sir Stode's House, or in what County, or in what Place.

Then the Innuendo must be the only Support of this Information, and that makes it worse, for the Defendant says, that Sir Stode was then at Newnham, which may be taken as intended any Newnham in England; and by the Innuendo it is tied up to a special Newnham in Devon, at which Place it both not appear he was Sir Stode then was; so there being no such Newnham mentioned before the Innuendo is immaterial, for the Duty of an Innuendo is to ascertain a Thing mentioned before.

They should have set forth, that there was a Trial, &c. that a Deed was given in Evidence, and that Sir Stode was produced as a witness to support that Deed, that he had a House in Devon, called Newnham, and that he deposed, he saw the Deeds executed in Albermarle House at such a Time; and the Defendant says, that Sir Stode was then at Newnham.

When Things spoken are uncertain, they shall not be made plausible by an Allegement; as to say of an Attorney, Thou hast forged Writings, innuendo Bonds and Covenants; or to say, a Man had the Pox, innuendo the French Pox.

3 Bull. 265.

There ought to be a greater Certainty of the Place, than of an Addition to the Party; and for this Reason, where eighteen were indicted for a Riot, and there was no Place named where they were at them in peace, the Indictment was quashed.

1 Bull. 183.

Cro. El. 428.

In Michaelmas-Term, Anno 9. E. 6. a Man was indicted in this Court upon the Statute 5 Eliz. for Perjury. The Indictment set forth, That there was a Suit in Chancery between two Parties, for the Manor of Staverton in Devon, and a Commission was awarded to examine Witnesses in that Cause, and that the Defendant being examined, did swear, that a Proponent of the Manor was delivered to an Oath, &c. Innuendo proed. Moxon. But he did not appear that the Oath, which the Defendant then made of the Delivery of that Deed, did concern the Manor of Staverton then in Question; and it shall not be made more certain by the following Words, viz. (Moxon proed. Innuendo) because a Man shall not be punished for a Perjury by the Use of an Innuendo.

But though the Indictment was upon the Statute, yet the same Reason which was then given, will hold good upon an Information at Common Law for the same Offence.

It is said that the Indictment was upon the Statute, yet the same Reason which was then given, will hold good upon an Information at Common Law for the same Offence.

Upon the whole Matter, 'tis uncertain what Newnham was intended by the Witness, for 'tis not inconsistent with his Evidence, to say that it was Newnham in Middlesex; and the Jury would have no Consideration of it, unless it had been described to them, by asking what Newnham was meant.

So that without the Innuendo, non constat what Newnham it is; for it may be a House, or a Mill, or a Lieu Conus, and near Albemarle-House, 'tis the Distance from thence which makes the Thing material.

Now Mr. Storde having deposed, that on or about the Middle of July, he was a Witness to the Execution of the Deeds at Albemarle-House, and the Defendant having sworn he was then at Newnham generally, it may be intended the very next House to Albemarle-House; but the Innuendo makes it to be at Newnham in Devon; which is different from what was sworn, for the Law Prima facie intends Newnham to be a Mill, and the Innuendo makes it to a particular House in a Parish, which alters the very Signification of the Word, and rebuts it from a Generality to a Certainty.

The Law will not allow Words to be enlarged by an Innuendo, so as to support an Action on the Case for speaking them; a multo fortiori in Cases of Perjury, for that would be to commit a Fallacy of one of the highest Crimes in a Matter never sworn by him.

This was the Opinion of Justice Gawdy, that a Man cannot be perjur'd by an Innuendo. Hob. 2, 6, 45.
1 Vent. 337.
2 Cro. 126.

And there is no Authority cited on the other Side, to prove that an Innuendo will make Words actionable which are not so in their own Nature; but where a Colloquium is laid, or the Words of themselves are actionable, there an Innuendo may explain them. And therefore it was agreed, that if a Man say, Thou hast stolen my Piece, Innuendo my Gun, the Action will not lie; for though by common Intendment a Piece is a Gun, yet 'tis uncertain, and shall not be helped by an Innuendo; but if there had been any previous Discourse of a Gun, then the Action might have been supported by the Innuendo. Godb. 191.
Skin. Rep. 68,
69.
Godb. 339.

2. Perjury must be in something material to the Issue, for if it be wholly foreign and impertinent, 'tis not Perjury, but a vain and idle Oath. Godb. 191.

In Michaelmas Term, 5 Jacobi, a Man was indicted in the Star-Chamber for Perjury committed by him in the Court of Requests, in giving Evidence there in a Cause concerning the Title of Lands, which was resolved by all the Judges of England not

to be punishable, for it was an impertinent and not a corrupt Oath, because that Court hath no Authority to examine such Titles.

Hob. 13.
11 Rep. 13.

The Oath of a Jury-Man is, That he shall well and truly try the Issue between the Parties: So that if he doth try any Thing besides the Issue, 'tis Per non Juratum, and if his Verdict thereupon be false, 'tis not Perjury, neither can he be attainted, because neither Party is grieved thereby,

Econtra.

It was argued for the King, That the Innuendo makes the Place certain enough, and that the Breach of the Oath is well assigned; for 'tis laid in Fact, That Mr. Strode non fuit apud Newnham præd.

'Tis admitted, that an Innuendo is not proper to extend Words beyond their ordinary and common Meaning; and likewise where a Word is capable of two Significations, and by an Innuendo is tied up to one, that shall not prejudice the Party: As for Instance, if a Man say I stole his Corn, it may be as well standing Corn, as cut down.

Neither can an Innuendo restrain a Genus, as him or her. Thus they who argued for the King, as well as those who had argued for the Defendant, did not differ in the Law concerning an Innuendo, but only in the Application of it.

Now in this Case, the Court cannot take Notice judicially, that Newnham is a general Word, or that it hath two known Significations.

Post. 332.

But admitting that the Place is not well explained, and that the Innuendo was out of the Case, then Newnham is at large, and non constat where it is; but be it where it will, it must be another Place from Albemarle-House. Now supposing it to be near Albemarle-House, 'tis still Perjury in the Defendant; for Mr. Strode deposed he was at such a Time in Albemarle-House, and the Defendant swore he was then at Newnham, supposing it to be the next Door.

5 Eliz. cap. 9.
3 Inst. 167.

My Lord Coke, in his Exposition upon the Statute 5 Eliz. saith, That if the Thing sworn be not true, and not material to the Point in Suit, 'tis not Perjury, because it is Extrajudicial, and that in giving a Remedy to the Party grieved, he can in no Sort be damnified if the Deposition be not material to the Matter in Issue.

This

This Opinion of my Lord Coke must be intended upon the Statute, and 'tis then a little too freight; for if the Thing sworn be impertinent, or doth but conduce to the Matter in Issue, and false, 'tis still Perjury,

But what was sworn in this Case, was not so immaterial to the Point in Issue, for it may create a Belief in the Jury, that Mr. Strode was not at Albemarle-House at that Time he swore himself to be there.

The Case put in those Books upon the Statute.

As to the Case in Cro. Eliz. which hath been objected, that proves nothing against this Innuendo; it was a Suit in Chancery for the Honor of Staverton, and the Defendant swore that a Feoffment of the Honor was delivered as an Escrow, when in Truth it was delivered absolutely: And this was assigned for Perjury in the Defendant, with an Innuendo præd. Manerium; because he had not sworn that the Feoffment was of the Honor of Staverton, but of the Honor generally, the Oath was held to be immaterial to the Matter in Issue, it was not shewn that either Party produced the Feoffment at the Commission, or if it had been produced, that it concerned the Honor then in Question, which being so very uncertain, could not be supplied by an Innuendo; and for this Exception that Indictment was discharged; besides, it was an Indictment upon the Statute, and not at Common Law as this is.

But here the Innuendo is explanatory without adding any Thing to the Sense of the Words precedent; for 'tis laid, That Mr. Strode being produced as a Witness, did depose, that such a Day in July he was Witness to the executing of Deeds in Albemarle-House, in the Parish of St. Martin in the Fields. The Defendant swore, Mr. Strode at that Time in July was at Newnham, Ubi revera & in facto he was at no Time in July in that Year at Newnham: And this is found by the Verdict.

Yelv. 21.
Alley 32.
Cro. El. 193.

In Innuendo hath been allowed to make a farther Explanation of precedent Words than in the Case at Bar.

As in an Action on the Case for slander the Plaintiff's Title, he declared, That he was seized of the Honor of Upton Grey, and that the Defendant said he had no Title to Upton, Innuendo Upton Grey. After a Verdict for the Plaintiff, this Exception was taken in Arrest of Judgment, viz. That the Words were spoken of Upton generally, which cannot be intended of Upton Grey, and so could not be helped by the Innuendo. But the Court was then of Opinion, that it was sufficient to explain what Upton was intended, and so affirmed the Judgment.

Cro. El. 419.
Martin versus Maynard.

Now it is plain, they had this Matter under Consideration before they came to the Verdict, because when the Judge told them he would not record the first Verdict, they immediately found the Defendant guilty: which is an Argument, they were fully agreed of the Fact to find him guilty, though they could not find him wilfully and corruptly guilty, because they had no Evidence of it.

Now to imagine this to be a Discommodious, is an Offence and Reflection upon the Court; for if there had been any Misbehaviour, the Judge would have told them of it.

They should have opposed the receiving this Verdict; but since it is recorded, they must not now set it aside.

11 H. 4. 2. 4.
Brook, consp.
13.

For Authorities, the Case Anno 11 H. 4. was cited, which was an Action of Conspiracy brought against two, and upon that guilty pleaded, the Jury found one guilty, and acquitted the other; and they being advised by the Court to consider better of their Verdict, which was contradictory in itself, because one alone could not conspire, they thereupon found both guilty, which is a stronger Case than this at Bar.

1 Vent. 238.

Plowd. 211.
B. in Saun-
der's and Free-
man's Case.

It is no new Thing for a Jury to recall their first Verdict, and for the Court to receive another at the same Time: This was done in one Archer's Case, when the Jury acquitted upon an Indictment of Felony; and immediately they recollected themselves, and told the Court they were mistaken, and found him guilty. And this was entered as their Verdict.

sid. 58.

Econtra.

3 Keb. 525.
Jones 163.

New Trials have been granted in this Court after a Conviction of Perjury. It was done in the Case of one Cornelius, who was indicted for Perjury, for swearing that such a Person was at a Conventicle, when in Truth he was not; and it appearing that the Foreman of the Jury, who gave the Verdict, was Owner of the Barn where the Conventicle was held, and being challenged for that Reason, and yet sworn of the Jury, the Court granted a new Trial.

It hath been granted likewise for the Misconduct of the Jury, to whom the Plaintiff delivered a Paper after they were gone from the Bar.

The Law requires the Evidence to be clear to convict a Man of Perjury, and it must be of wilful and corrupt Perjury. Now when the Jury was satisfied that the Defendant was not guilty of wilful and corrupt Perjury, and yet find him guilty generally, this is a Verdict which is repugnant in itself.

They ought to find him guilty of wilful and corrupt Perjury,

In an Indictment for Perjury, brought upon the Statute of the Queen, the Plaintiff declared, That the Defendant Falso dixit & deposuit, and shewed in what Issue, and in what Court, and concluded, &c. sic commisit voluntarium & corruptum Perjurium. The whole Court were of Opinion, That this Declaration was insufficient, because it was not said, that Falso voluntario & corrupto dixit, &c. for the Clause implied followed, &c. sic commisit voluntarium & corruptum Perjurium, will not help it, because it is a Conclusion upon Premises insufficiently alleged.

The Counsel for the King would excuse this Oversight in the Jury, by the Common Case, of asking the Opinion of the Court in a Point of Law, which it is their Duty to do; but that is not applicable to this, for they were agreed upon two Verdicts which were inconsistent, and upon the latter without any Consideration at all.

It is agreed they may vary from a pious Verdict; the Reason is, because it may be presumed that they had some subsequent Consideration of the Evidence after such Verdict given.

Besides, a pious Verdict in Strictness is no Verdict, it is only a Favour which is allowed to the Jury for their Ease.

Raym. 193.

Curia. The Court.

If the Thing sworn was manifestly false, the Mind must be corrupt, and then there need be no Evidence of Wilfulness. Ad-journatur.

Stanhope v. Smith. Mich. 8 W. 3. Rot. 462.

AN Action was brought upon a Note for Money won at Play. The Defendant pleaded the Statute of Gaming, and set forth, that at one Sitting he lost 85 l. to the Plaintiff, and 40 l. more to one Yate; and upon Demurrer it was argued, that the Act made no Securities void, neither was the Winner to pay the treble Value of the Money won, unless it was above 100 l. for if three Men should each of them win 50 l. neither of them shall forfeit; for though it is more than 100 l. among them all, yet it is under that Sum to each, and the Statute makes no Forfeiture, but where the Person winning has got above 100 l. at one Sitting.

Vide 1 Salk.

344, 345.

Lutw. 180.

3 Keb. 671.

4 Mod. 409.

Ante 1, 2,

175.

See 9 Annæ,

c. 14.

On

27 & 28 Car.
2.
Rol. 109, 110.
Hodgson ver.
Mallen.

On the other Side it was alledged, That in Hillary Term, 27 & 28 Car. 2. two Judgments were given against the Pleas to Demurrers upon the like Plea, and in the Case between Edgebury and Rosindale, which was upon Articles concerning a Horse-Ratch, wherein the Defendant agreed to run four Heats at several Days for 40 l. each Heat. This was held by my Lord Hale to be but one Agreement, tho' to be run at several Times, and the Defendant in that Case had Judgment.

But in the principal Case, Judgment was given for the Plaintiff, for the Statute intends a Remedy where more than 100 l. is lost to one Person, and at one Sitting; for if it be lost to several, it is not within that Act: As for Instance, If a Man loses 95 l. to one Man, and refuses to play any longer with him, and then voluntarily loses 10 l. to another at the same Sitting; this shall not defeat the first Person of the Money which he lawfully won.

Toddard v. Middleton. Pasch. 9 Rot. 199.

Ca. in Law
and Equ. 228.

AN Action of Covenant was brought upon the Penalty of certain Articles, wherein the Defendant had agreed to pay so much per Chaldron for all Coals laden either at Newcastle, or upon the River Tyne, and brought to London; and the Breach assigned was, That the Coals were laden on such a Ship infra Portum de Tinmouth, viz. at North Shields, and brought from thence to London.

Vide Ante
286, 287,
346.

To this Declaration the Defendant demurred, because it did not appear that Tinmouth was upon the River Tyne, and so the Breach is not well assigned, and the Court cannot take Notice judicially, that Tinmouth is upon that River; and for this Reason they inclined against the Plaintiff, but gave him Leave to discontinue upon Payment of Costs.

Maddison versus Shore.

RAd'us Maddison per Will'um Duncomb Attorn. suum queritur de Patricio Shore, gen. un. Attorn. Curiae Domini Regis de Banco presen. hic in Curia in propria Persona sua de eo quod non reddidit ei decem libras quas ei debet & injuste detinet pro eo videlicet quod cum in statuto in Parlamento Domine Elizabethae nuper Reginae Angliae apud Westm. in Com. Mid. duodecimo die Januarii, Anno regni sui quinto, tent. edit. inter alia in-

actitat.

actitat. fuit autoritate ejusdem Parlamenti quod si aliqua Persona, &c.

Cumque idem Rad'us nuper scil't Termino Sancte Trinitatis, Anno Regni Domini Will'i nunc Regis Angliæ Septimo, in Curia ejusdem Domini Regis nunc hic coram ipso Rege eadem Curia apud Westm. præd. tunc existen. impli'tasset quendam Steph'um Rothwell per Breve dicti Domini Regis de Sci. Fa. Vic. Lincoln direct. pro restitution. habend. de quindecim libris quas ipse antea in Curia ejusdem Domini Regis de Banco apud Westm. per judicium ejusdem Curie de Banco recuperasset versus eum pro damnis suis quæ sustinuit tam occasione cujusdam transgressionis eidem Stephano per ipsum Rad'um nuper illat. quam pro mis. & Custagiis suis per ipsum circa sectam suam in ea parte apposit. quod quidem judicium idem Rex in Curia sua coram ipso Rege apud Westm. præd. ob Errores in Recordo & Processu inde compert. revocasset & adnullasset per quod consideratum fuit in eadem Curia dicti Domini Regis coram ipso Rege apud Westm. quod idem Rad'us ad omnia quæ ipse occasione judicii præd. amisisset restitueretur & idem Dominus Rex nunc in dicta Curia sua coram ipso Rege ex parte ipsius Rad'i acciperet quod ipse post judicium præd. redditum fuit & ante revocation. ejusdem scilicet 20 die Junii, Anno regni ejusdem Domini Regis 3º apud Wragby in Com. Lincoln præd. solveret præd. Stephano præd. quindecim

libras per eundem Steph'um versus ipsum Rad'um ut præfertur recuperat. in Plena satisfactione & exoneratione damnor. præd. prout in eodem Breve de Scire Facias plenius continetur quod quidem Breve de Sci. Fa. præd. Steph'us præd. Termino Sancte Trinitatis, Anno septimo supradicto in præd. Curia Domini Regis coram ipso Rege apud Westm. præd. comparen. Placitabat in Barram sive præclusionem hujusmodi restitution. versus eum habend. quod præd. Rad'us post judicium præd. reddit. & ante revocationem ejusdem non solvit. eidem Stephano præd. quindecim libras modo & forma prout per dictum Breve de Sci. Fa. superias suppo'it fuit & de hoc posuit se super patriam & præd. Rad'us si'liter id' præcept. fuit Vic. Com. Lincoln quod Venire faciat coram Domino Rege a die Sancte Trinitatis in tres septimanas ubicunque, &c. duodecim, &c. per quos, &c. & qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. fuit partibus præd. &c. ad quem diem coram Dom. Rege apud Westm. ven. tam præd. Rad'us quam præd. Steph'us per Attorn. suos præd. & Vic. Com. Lincoln mis. inde Breve de Venire facias in omnibus servit. & execut. una cum panello de nominibus Ju'ra quorum null', &c. ideo præcept. fuit Vic. Com. Lincoln præd. qd. Distring. Jur. præd. per omnes Terras & Catalla, &c. & quod de exit', &c. ita quod habeat corpora eor. coram Domino Rege a die S. Mich'is in TresSeptiman.

X x x x

ubi-

27 & 28 Car.
2.
Rol. 109, 110.
Hodgson vtr.
Mallen.

On the other Side it was alledged, That in Hillary Term, 27 & 28 Car. 2. two Judgments were given against the Pleas to Demurrers upon the like Plea; and in the Case between Edgebury and Rosindale, which was upon Articles concerning a Horse-Ratch, wherein the Defendant agreed to run four heats at several Days for 40 l. each heat. This was held by my Lord Hale to be but one Agreement, tho' to be run at several Times, and the Defendant in that Case had Judgment.

But in the principal Case, Judgment was given for the Plaintiff, for the Statute intends a Remedy where more than 100 l. is lost to one Person, and at one Sitting; for if it be lost to several, it is not within that Act: As for Instance, If a Man loses 95 l. to one Man, and refuses to play any longer with him, and then voluntarily loses 10 l. to another at the same Sitting; this shall not defeat the first Person of the Money which he lawfully won.

Toddard v. Middleton. Pasch. 9 Rot. 199.

Ca. in Law
and Equ. 228.

AN Action of Covenant was brought upon the Penalty of certain Articles, wherein the Defendant had agreed to pay so much per Chaldron for all Coals laden either at Newcastle, or upon the River Tyne, and brought to London; and the Breach assigned was, That the Coals were laden on such a Ship infra Portum de Tinmouth, viz. at North Shields, and brought from thence to London.

Vide Ante
286, 287,
346.

To this Declaration the Defendant demurred, because it did not appear that Tinmouth was upon the River Tyne, and so the Breach is not well assigned, and the Court cannot take Notice judicially, that Tinmouth is upon that River; and for this Reason they inclined against the Plaintiff, but gave him Leave to discontinue upon Payment of Costs.

Maddison *versus* Shore.

RAd'us Maddison per Will'm Duncomb Attorn. suum queritur de Patricio Shore, gen. un. Attorn. Curia Domini Regis de Banco presen. hic in Curia in propria Persona sua de eo quod non reddidit ei decem libras quas ei debet & injuste detinet pro eo videlicet quod cum in statuto in Parlamento Domine Elizabetha nuper Regina Angliae apud Westm. in Com. Mid. duodecimo die Januarii, Anno regni sui quinto, tent. edit. inter alia in-

actitat.

actitat. fuit autoritate ejusdem Parlamenti quod si aliqua Persona, &c.

Cumque idem Rad'us nuper scil't Termino Sanctæ Trinitatis, Anno Regni Domini Will'i nunc Regis Angliæ Septimo, in Curia ejusdem Domini Regis nunc hic coram ipso Rege eadem Curia apud Westm. præd. tunc existen. impli'tasset quendam Steph'um Rothwell per Breve dicti Domini Regis de Sci. Fa. Vic. Lincoln direct. pro restitution. habend. de quindecim libris quas ipse antea in Curia ejusdem Domini Regis de Banco apud Westm. per judicium ejusdem Curie de Banco recuperasset versus eum pro damnis suis quæ sustinuit tam occasione cujusdam transgressionis eidem Stephano per ipsum Rad'um nuper illat. quam pro mis. & Custagiis suis per ipsum circa sectam suam in ea parte apposit. quod quidem judicium idem Rex in Curia sua coram ipso Rege apud Westm. præd. ob Errores in Recordo & Processu inde compert. revocasset & annullasset per quod consideratum fuit in eadem Curia dicti Domini Regis coram ipso Rege apud Westm. quod idem Rad'us ad omnia quæ ipse occasione judicii præd. amisisset restituatur & idem Dominus Rex nunc in dicta Curia sua coram ipso Rege ex parte ipsius Rad'i acciperet quod ipse post judicium præd. redditum fuit & ante revocation. ejusdem scilicet 20 die Junii, Anno regni ejusdem Domini Regis 3^o apud Wraghsby in Com. Lincoln præd. solveret præd. Stephano præd. quindecim

libras per eundem Steph'um versus ipsum Rad'um ut præfertur recuperat. in Plena satisfactione & exoneratione damnor. præd. prout in eodem Brevi de Scire Facias plenius continetur quod quidem Breve de Sci. Fa. præd. Steph'us præd. Termino Sanctæ Trinitatis, Anno septimo supra dicto in præd. Curia Domini Regis coram ipso Rege apud Westm. præd. comparen. Placitabat in Barram sive præclusionem hujusmodi restitution. versus eum habend. quod præd. Rad'us post judicium præd. reddit. & ante revocationem ejusdem non solvit. eidem Stephano præd. quindecim libras modo & forma prout per dictum Breve de Sci. Fa. superias suppo'it fuit & de hoc posuit se super patriam & præd. Rad'us si'liter id' præcept. fuit Vic. Com. Lincoln quod Venire faciat coram Domino Rege a die Sanctæ Trinitatis in tres septimanas ubicunque, &c. duodecim, &c. per quos, &c. & qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. fuit partibus præd. &c. ad quem diem coram Dom. Rege apud Westm. ven. tam præd. Rad'us quam præd. Steph'us per Attorn. suos præd. & Vic. Com. Lincoln mis. inde Breve de Venire facias in omnibus servit. & execut. una cum pannello de nominibus Juræ quorum null', &c. ideo præcept. fuit Vic. Com. Lincoln præd. qd. Distring. Jur. præd. per omnes Terras & Catalla, &c. & quod de exit', &c. ita quod habeat corpora eor. coram Domino Rege a die S. Mich'is in Tres Septiman.

X x x x

ubi-

ubicunque, &c. vel coram Justitiariis Domini Regis ad Assisas in Com. Lincoln. capiend. assign. si prius die Lunæ decimo quinto die Julii, apud castrum Lincoln in Com. præd. per formam statuti. &c. ven. pro defectu Jur', &c. prout per record. & process. inde in dicta Curia dicti Dom. Regis coram ipso Rege apud Westm. præd. residen. plenius apparet. Cumque nuper hic idem Rad'us eodem Termino Sanctæ Trinitatis Anno supradicto prosecut. fuisset extra eandem Curiam dicti Domini Regis Breve de Subpoena præfat. Patricio & cuidam Johanni Doe direct. per quod quidem Breve eidem Patricio & Johanni præcept. fuit quod omnibus aliis prætermisissis & excusationibus quibuscunque cessan. in propriis Personis, &c. Quod quidem Breve de Subpoena idem Rad'us postea & antea præd. Assisas scilicet, 13 die Julii, Anno 7 supradicto apud Castrum Lincoln eidem Patricio deliberavit ac duos solidos & sex denarios pro ejus Castagiis & oneribus in hac parte sustentan. eidem Patritio solvit. qui quidem duo solid. & sex denar. fuer. sufficien. pro Custagiis & oneribus ipsius Patritii secundum distantiam locorum vocation. & statum ipsius Patritii ac licet ad præd. Assisas præd. die Lunæ decimo quinto die Julii apud Castrum Lincoln in Com. præd. tent. coram Johanne Powell Milite ad tunc un. Baron Scaccarii dict. Domini Regis & Georgio Dodson Ar. eidem Johanni Powell associat. & Nich'o Lechmere Mil. al.

Baron. Scaccarii dict. Domini Regis Justitiar. ipsius Domini Regis ad Assisas il. in Com. Lincoln capiend. assign. per formam statuti hic vice associat. præsentia præd. Nich'i Lechmere non expectat. virtute Brevis dicti Domini Regis de si non omnes, &c. vener. tam præd. Rad'us per Attorn. suum præd. quam præd. Steph'us per Ric'um Milner Attorn. suum & Jur. Juratæ illius exact. si liter venerunt & ad veritatem de exit. præd. inter ipsos Rad'um & præfat. Steph'um jurat. dicend. electi triat. & jurat. fuer. præd. tamen Patritius statut. præd. minime ponderan. nec pœnam in eodem content. veren. coram præfat. Justitiariis ad Assisas præd. prædicto die Lunæ decimo quinto die Julii apud Castrum Lincoln præd. juxta exigentiam præd. Brevis de Subpoena non compevit ad notitiam suam in causa præd. dicend. nullum ad tunc habend. legitimum seu rationabile obstaculum sive impedimentum in contrarium inde sed ad tunc & ibid. in causa præd. jurari & notitiam suam inde dicere juxta tenorem ejusdem Brevis default. fecit contra formam statuti præd. per quod præd. Rad'us exit. ill. ex parte sua Jur. Juratæ illius pro defectu Testimonii præd. Patritii Shore probare non potuit nec sectam suam præd. versus præfat. Steph'um ulterius prosequi sicque idem Rad'us magnopere gravat. & multipliciter deteriorat. fuit per quod vigore statuti præd. actio accrevit eidem Rad'o ad exigend. & habend. de præfat. Patritio

Patritio præd. decem libras præd. tradixit & adhuc contradic. unde tamen Patritius licet sapius requisit præd. decem libras eidem Rad'o nondum reddidit sed il. eum habet ad Valentiam centum librarum inde petit remedium, &c.

Maddison *versus* Shore.

THIS was an Action of Debt brought upon the Statute for ; El. cap. 9. not appearing and giving Evidence at the Assizes, being served with a Subpoena for that Purpose. Upon Nil debet pleaded, there was a Verdict for the Plaintiff: And it was moved in Arrest of Judgment.

1. That it did not appear by the Declaration, that the Subpoena was left with the Defendant, for the Delivery of the Ticket, and reading the Writ, is no good Service.

But this Exception was over-ruled, for the Plaintiff shewed that he delivered the very Writ of Subpoena to the Defendant himself; but the Delivery of a Ticket containing the Substance of the Writ, is a sufficient Service within the Act.

2. It was then objected, That the Plaintiff had not set forth any special Damage which he had sustained by the Negligence of the Defendant in not appearing to give Evidence, as that he was nonsuited, or could not proceed to Trial for want of the Defendant's Evidence, and the Action is given to the Party grieved. Now if the Plaintiff is not grieved, he cannot bring this Action.

For the Plaintiff it was insisted, That the Action being only brought for the 10 l. and not for any more Damages, the Declaration was well enough.

But the Court of Common Pleas held the Declaration to be ill for this last Objection; because there must be a Party grieved, otherwise there is no Cause of Forfeiture, and there must be a particular Damage set forth, though this was contrary to a Judgment in the like Case, Anno 30 Eliz. where the like Exception was taken and over-ruled. 1 Leon. 122.
Cro. Eliz.
130. idem.

Afterwards a Writ of Error was brought on this Judgment, but it was affirmed.

Vinkestone versus Ebden.

Civit. Ebor. ff. **M**emorandum q'd alias sci't Termino Paschæ ult. præterit. coram Dom. Rege apud Westm. venit Hubertus Vinkestone per Galfridum Vibergh Attorn. suum, & protulit hic in cur. dict. Domini Regis tunc ib. quand. billam suam versus Jacobum Ebden in Custodia Marefc', &c. de Placito transgr. super casum & sunt pleg. ad prosequend', ff. Johannes Doe & Ric'us Roe quæ quid. Billa sequitur in hæc verba, ff. Civit. Ebor', ff. Hubertus Vinkestone queritur de Jacobo Ebden in Custod. Mar. Marefc. Domini Regis coram ipso Rege existen. pro eo videl't quod cum idem Hubertus ultimo die Augusti Anno Regni Domini Will'i nunc Regis Angl', &c. Septimo apud Civitat. Ebor. possessionat. fuit de una Anchora sex velis [Angl. *Sass-Cloth*] tribus funibus Anchorariis ad Valenc. decem libr. leg. monetæ Ang. ut de bonis & Catallis suis & id. Hu'tus sic inde possessionat. existen. postea scil't eisd. die & Anno apud Civitat. Ebor. præd. Bona & Catalla præd. extra manus & possessionem suis præd. Casualit. perdidit & amisit quæ quid. Bona & Catalla postea scil't primo die Octobr. Anno septimo supradicto apud Civit. Ebor. præd. ad manus & possession. præd. Jacobi per invention. devener. præd. tamen

Jacobus scien. Bona & Catalla præd. fore Bona & Catalla ipsius Huberti propria & ad ipsum de jure spectare & pertinere Machinan. tamen ipsum Hubertum de Bonis & Catallis præd. callide & subdole decipere & defraudare Bona & Catalla præd. eidem Huberto licet postea scil't eisdem die & Anno ult. mentionat. apud Civit. Ebor. præd. per ipsum Hubertum requisit. fuit non deliberavit sed Bona & Catalla præd. postea scil't eodem die & Anno ult. mentionat. apud Civit. Ebor. præd. in usum suum proprium convertit & disposuit ad dampn. ipsius Huberti quinquagint. librar. & inde producit sectam, &c.

Et modo ad hunc diem scil't diem Mercurii prox. post Tres Septimanas Sancti Mich'is isto eodem Termino usque quem diem præd. Jacobus habuit licentiam ad Billam præd. interloquend. & tunc ad respondend', &c. coram Domino Rege apud Westm. venerunt tam præd. Hubertus Vinkestone per Attorn. suum præd. quam præd. Jacobus Ebden per Henricum Clarebrough Attorn. suum & idem Jacobus defendit vim, & injur. quando, &c. & dic. quod ipse non est inde Culpabilis & de hoc ponit se super patriam, & præd. Hubertus similiter, &c. ideo ven. inde jur. coram Domino Rege apud Westm. die

Mer-

Mercurii prox. post Octab. Puri-
fication. Beatæ Mariæ Virginis &
qui nec, &c. ad recogn', &c.
quia tam, &c. id. dies dat. est
partibus præd. ib', &c.

Ad quem diem Jur. int. partes
præd. de Placito præd. possit. fuit
inde ulter. eos in resp. hic usque
diem Mercurii prox. post Quin-
den. Pasche tunc prox. sequen-
tis Justiciar. dicti Domini Regis
ad Assisas in Civitat. præd. ca-
pien. assign. per formam statuti,
&c. die Mercurii undecimo die
Martii apud Guildhall Civit. E-
bor. præd. prius ven. & modo ad
hunc diem ven. tam præd. Hu-
bertus Vinkestone quam præd.
Jacobus Edden per Attorn. suos
præd. & præfat. Justic. coram
quibus, &c. Miser. hic record. in
hæc verba, si. Postea die & loco
infracontent. coram Johanne Tur-
ton Mil. un. Baron. Scaccarii Do-
mini Regis & Thoma Hæsetyne
Ar. eidem Johanni Turton, &
Ed'o Nevill Militi, un. Justic.
dicti Domini Regis de Banco
Justiciar. ipsius Domini Regis ad
Assisas in Com. Civit. Ebor. ca-
pien. assign. per formam statuti,
&c. hac vice associat. virtute Bre-
vis dicti Domini Regis de si non
o'es, &c. ven. tam infranominat.
Hubertus Vinkestone quam infra-
script. Jacob. Edden per Attorn.
suos infracontent. & Jur. unde
infra sit men. exact. silit. venet.
qui ad veritat. de infracontent.
dicen. electi triat. & Jurat. dicunt
super sacrament. suum quod præd.
Hubertus inframentionat. tem-
pore in Narratione infra-script. in-

terius mentionat. possessionat.
fuit de Bonis & Catallis in Nar-
ratione ipsius Huberti interius
specificat. ut de Bonis & Catallis
suis propriis & idem Jurator. su-
per sacrum suum dicunt ulterius
quod villa Novi Castri super Ti-
nam est antiqua Villa & quod
Port. Novi Castri super Tinam est
antiqua portus sub cura consue-
tation. & gubernation. Major.
& Burgens. ville ill'. quodq; per
consuetud. infra eand. villam a
tempore cujus contrar. Memoria
hominum non existit usitat. Ma-
jor & Burgens. villa præd. ad
Onera & Custagia sua propria
eund. Portum reparare mundare
& pro salva & secura Navigation.
& mora navium ib. commodum
reddere & servare usi fuer. & con-
suever. & tenentur & quod in
cons. inde Major & Burgens. vil-
la præd. per totum tempus supra-
dict. habuer. & receper. & habere
& recipere usi fuer. & consue-
ver. & debuer. debitum [Anglice
a Duty] vel Tolnetum quinque
denar. per Celdam [Angl. Chal-
don] pro omnibus Carbonibus &
portu villæ præd. exportat. vel
in aut super aliquam navem posit.
& onerat. cum intentione fore
exportat. & quod officarius [vo-
cat. the Waler-Bailiff] dictæ
villæ Novi Castri pro tempore
existen. sive ejus deputat. a toto
tempore supradicto distrinxit &
distringere usus fuit & consuevit
quæcunque Bona & Catalla per
legem Distringibil. [Anglice dis-
trainable] quarumcunque Per-
sonar. Bon. & Merchandiz. præd.

exportant. vel sup. navem onerat. fore exportat. & debitum vel Tolner. præd. solvere recusant. pro non solution. dicti debiti vel Tolnet. & jurat. præd. super sac. suum ulterius dicunt quod præd. Hubertus ante præd. tempus in Narratione infrascript. interius specificat. quand. navem ipsius Huberti [vocat. the William and Thomas of Lyme] cum quinquaginta Celdis Carbon. [Anglice *Chaldron of Coals*] valoris viginti & septem. librar. & decem solidor. infra Portum Novi Castri præd. onerari ea intentione ad eisdem Carbones a dicto portu exportand. & iidem Jurator super sacrum suum præd. ulterius dicunt quod præd. Jacobus præd. tempore quo, &c. in Narration. infrascript. interius mentionat. & diu antea fuit & continuavit officiar. ejusdem villæ & portus [vocat. *Deputy Water-Bailiff*] per Majorem & Burgenfes præd. debito modo constituit. & idem Jacob. invenien. Navem præd. cum Carbonibus præd. ut præfert. onerat. parat. fore exportat. dict. deb. vel Tolner. pro carbonibus præd. a præd. Hub'to petiit & demandavit & præd. Hub'tus dict. debitum vel Tolnet. solvere omnino recusavit & superinde præd. Jacobus Bona & Catalla in Narration. infrascript. interius mentionat. existen. part. sive parcel. Armamentor. [Anglice *Cackle*] dicti Navis spectan. pro & in nomine distriction. cepit & adhuc detinet pro non sol. dictor. debiti & Tolneti & iidem Jura-

tor. super sac. suum præd. ulterius dicunt quod Bona & Catalla in Narration. infrascript. interius mentionat. tempore captionis eor. valebant septem libras & decem solid. sed utrum super totam materiam præd. per jur. præd. in forma præd. compert. dicta Bona & Catalla sunt in tali casu distringibilia [Angl. *distrainable*] per legem terræ necne Jur. præd. penitus ignorant & inde petunt advisament. consl. Cur. hic & si super totam materiam præd. in forma præd. compert. videbitur Cur. hic in tali casu non sunt distringibilia [Anglice *distrainable*] tunc Jur. præd. dicunt super sac. suum præd. quod præd. Jacobus est culpabilis de præmissis interius ei imposit. modo & forma prout præd. Hubertus interius inde versus eum queritur & tunc assid. dampna ipsius Huberti actione infrascript. ultra mis. & Custag. suum per ipsum circa sectam suam in hac parte apposit. ad septem libras & decem solid. & pro mis. & Custag. il. ad quadragint. solid. sed si super totam materiam præd. per Jur. præd. in forma præd. compert. videbitur Cur. hic quod præd. Bona & Catalla per legem sunt in tali casu distringibil. tunc Jur. præd. super sac. suum præd. ulterius dicunt quod præd. Jacobus non est culpabilis de præmissis interius ei imposi. prout præd. Jacobus interius pro se Placitando allegavit & quia Cur. dicti Domini Regis nunc hic de Judicio suo, &c.

Vinke-

Vinkestone *versus* Ebdon.S. C. 1 Salk.
248, 249.

TROVER and Conversion for an Anchor, six Sall-Cloths, and three Cable-Ropes: Upon Not guilty pleaded, a special Verdict was found, *scilicet* That the Town of Newcastle was, Time out of Mind, an ancient Till, in which there was an ancient Port; that the Mayor and Burgesses of the said Town have, Time out of Mind, cleansed and maintained the said Port for the safe Navigation of Ships, and for the Benefit of Exportation. In Consideration whereof, they, and all those, &c. have, Time out of Mind, &c. received the Toll of 5d. for every Chaldron of Coals exported, or intended to be exported, out of the said Port. They find that the Plaintiff loaded a Ship with fifty Chaldron of Coals, and that he refused to pay the said Toll. They find that the Defendant was Under-Bailiff, and Servant to the Town of Newcastle, who distrained the Goods in the Declaration mentioned, for refusing to pay the Toll. They find also, that the said Goods were Part and Parcel of the Tackle of the Ship. Then they conclude, that they know not whether the said Goods are liable, or not, to be distrained for the Duty, which they submit to the Court; if they are not, then they find for the Plaintiff; but if otherwise, for the Defendant.

Vide 1 Sid.
348, 409.
2 Mod. 99,
102.
1 Mod. 77.
2 Vent. 50.
3 Lev. 260.Carth. 356.
S. C.

The single Point was, Whether the Tackle of the Ship may be distrained for this Duty? Or, Whether they ought not to distrain the Coal?

Those who argued for the Plaintiff held, That the Tackles were not distrainable, because they are necessary to carry on the Trade of Sailing, by which the Owner of the Vessel got his Livelihood, and are therefore privileged.

1 Bullfr. 201.
5 Rep. Gray's
Case.
Hob. 42.
Dyer 117.
2 Bullfr. 201.
1 Roll. Rep. 1.
3 Cr. 710.
1 Mod. 104.
2 Inst. 133.
W. 2. c. 18.

The Statute 51 H. 3. prohibits People to distrain Averia Carucae; and this, my Lord Coke says, is agreeable to the Civil Law, which commands, that Executio non fiat in Boves, aratra aliave instrumenta rusticorum, because they are of publick Use and Benefit.

And for this Reason, neither a Mill-Stone, or Smith's Anvil are distrainable; for if that should be allow'd, it would be a great Hindrance to those Men who use those respective Trades; and for this

14 H. 8. 25.
Bro. Abr. 23.
Rol. Rep.
2d part, 202.

this Reason the Horse of a Carrier is privileged: And there is no Difference as to this Matter, between a Carrier and the Master of a Ship, whose Tackle could be likewise privileged for the same Reason.

When a Distress is taken for a Toll, such Things ought to be distrained upon which the Duty doth arise; but in this Case the Prescription must be held, because no Duty at all is to be paid; for by Magna Charta, and other Statutes, the Subject hath Liberty to go and come upon the Sea without being disturbed. Now if the Defendant will prescribe for a Toll upon the Sea, he must lay a very good Consideration to intitle himself to such Duty, because it is against the Liberty of the Subject; but the Consideration here laid is not sufficient, it is only for cleansing and maintaining a Port which is for the publick Good of the Subject, and the King is the Governor of all the Ports; and therefore, where the like Prescription was made for maintaining a Wharf in River, the Judges inclined, that it was held, because it was not a sufficient Compensation to the Subject to deprive him of the Benefit of the Law.

Two Things are to be considered, where a Distress is taken for a Toll,

1. That the Distress may be returned in the same Condition that it was taken,

2. And in the next Place, that it may be made upon such Things which may be impounded, that a Replevin may be made therefore, according to the Course of the Common Law of this Realm.

Neither of which can be done in this Case; for when the Ship is once replevied, and at Liberty to sail, she cannot be returned in the same Condition as when distrained, because the Tackle may be damaged by the Weather, and no Man will be answerable for it when she is about to sail to another Land.

It cannot be objected, that here was any Necessity for such a Distress, because it is not found in the Writ, that this Ship was like to sail out of the River.

Moss Rep.
104.

Fitzherb.
Avowry,
Placito 192.

But

But the Jury have found, that there is a Custom in the Town of Newcastle for the Mayor and Burgesses to receive and cleave the Port, and in Consideration thereof to take a Duty of 5 d. for every Chaldron of Coals exported, &c. which is an outrageous Toll, and therefore unlawful; for the Coals there are not worth more than 12 s. per Chaldron.

The Statute of Marlbridge requires, That reasonable Distresses shall be taken, Et non minus graves propter excessum; and therefore it hath been adjudged, that where a Lord distrained two or three Oxen for one Shilling, the Party grieved might have an Action upon that Statute for the excessive Distress.

Econtra.

But on the other Side it was argued, that many Things are privileged from a Distress, as the Horse upon which a Man rides, or a Carrier's Horse, and a Horse at a Smith's Shop, Cloaths at a Tailor's; because it is not agreeable, that the Rent of a Stranger should be paid by such Things; but this must be understood where there is other Goods sufficient to be distrained; But if such are not to be found, then even the Beasts of the Plough are to be distrained; for Si summa quæ requiritur non ex aliis exurgit, nec arantibus parcendum est.

Now though it be generally true, that no Man shall be distressed by the Utensils of his Trade, yet that must also be intended where there are Goods, or other Beasts, enough to be distrained, and nothing besides the Rigging of the Ship could be distrained; for the Coals are put under-board, and not to be come at.

It would be altogether as inconvenient to bring an Action of Debt against the Master, because Trade will be as much prevented if the Master be arrested, as if the Rigging of the Ship be distrained; for he can sail no more without a Pilot than without Sails.

Besides, in the Case of Sea-faring Men, this is the most proper Remedy; for no Duty doth arise till the Ship is about to sail.

Z z z z

Then

Then as to the Consideration, it is sufficient to entitle the Plaintiff to this Duty; for though it is convenient that the Ship should sail, it is inconvenient that she should sail into a neglected Port.

The Admiralty have the proper Jurisdiction to take Care of Sailing; and it is usual in that Court to take out Process against the Ships, which may intimate, that such a Thing may be done at Common Law.

Curia. This is not disclaimable of Common Right, but by Custom, which is said to be as large as the Common Law.

Cro. Eliz.
549, 596.
2 Lev. 260.

There is a Difference between the Distress which is allowed by the Law for Rent, and for a Toll, as in this Case. Ad-journatur.

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Term. Sancti Mich.

Anno 9 W. 3. B. R. 1697.

Rex *versus* Cook, Snatt and Collier.

THEY were found guilty upon an Indictment for the following Crime, *viz.* Sir John Friend and Sir William Perkins were convicted for High Treason, in conspiring the Death of the King; and the Defendants being present with them at the Place of Execution, did all of them lay their Hands on Sir John Friend, who shewed no Repentance for the Crime for which he was about to die, and Cook pronounced the Absolution, and Snatt and Collier said Amen.

That they all three likewise laid their Hands on Sir William Perkins, who was likewise impenitent of this Crime, and Collier pronounced the Absolution, and Cook and Snatt said Amen. And that they all assented in, and assented to the said Absolution.

The Jury made a Special Conclusion in their Verdict, *viz.* Whether the Laying on the Hands of three, and but one at a Time pronouncing the Absolution, makes them all guilty of the whole Matter? Adjourn.

2 Salk. 631.
Hawk. P. C.
1st part, c. 17.
§. 9, 10.

Riccards *versus* Corneforth.

S. C. 2 Salk.
580.

WRIT of Error upon a Judgment in the Common Pleas, for taking several Cattle, in the Declaration mentioned, on the 26th Day of September, 7 Willielmi, in the Parish of Enfield.

The

The Defendant made Cognizance as Bailiff to Ralph Earl of Mountague, and Elizabeth his Wife, and sets forth, That the Duke of Albemarle was seized in Fee of the Lands, in which, &c. and being so seized, did demise the same to John Barthurst for twenty-one Years, under the yearly Rent of 140*l.* payable at Lady-Day and Michaelmas: That the Duke being seized of the Reverfish, did, on the 14th Day of July, in the Year 1667, make his Will, and bequeathed the Reverfish to the Dutchess; that the Duke died, and that the Earl hath since married the Dutchess. Et quia 350*l.* de Reddita præd. super Dimissionem præd. superius reservat. pro duobus Annis & dimid. unius Anni post Mortem præd. Ducis, finit. ad Festum S. Mich. Arch. ult. præterit. eidem Rad'o Comiti Mountague, & Elizabethæ Uxor. ejus, Tempore quo, &c. aretro fuerunt & insolut'. Idem the Defendant, ut Bailivus præd. Rad'i Comiti Mountague, & Elizabethæ Uxor. ejus, pro præd. 350*l.* & Reddito præd. facit Cognizance.

The Plaintiff pleaded in Bar, and said, That before the Duke made his Will, he did execute a Lease and Release of these Lands to the Earl of Bath in Fee, and recorded, that the Duke died seized, upon which they were at Issue, and the Defendant had a Verdict.

The Court argued upon it. The Declaration was of Hillary Term, 7 Willielm. which was in the Year 1695. and the Abowry and Cognizance are of the same Term, and the Counting is said to be 28 September, 7 Willielm. which was Michaelmas in the Year 1695. The Defendant justified the Counting, because 350*l.* Rent was in Arrear for two Years and a Half. Finit. ad Fest. S. Mich. Arch. ult. præterit. which must be Michaelmas 1695, and that Michaelmas Rent was not due at the Time of the Counting the Counting, which was on the 28th of September, in that the Defendant had paid in half a Year's Rent after the Dutchess was taken, and for this Reason the Judgment was erroneous.

Comh. 27,
28, 472, 476.
Carth. 179,
122.
Mod. Ca. in
Law and Equ.
1st part, 54.

But on the other Side several Authorities were cited, to prove that so much Certainty was not required in an Abowry as in a Declaration; for though an Abowry is in some Sort a Declaration, yet it is not so in omnibus; for the Abowant is a Defendant, and the Law allows him more Favour than a Plaintiff in an Action, who is to make out a Title to a Thing in Demand, and therefore his Declaration must be certain.

In Declarations, there can be but one Point in Issue; but in an Abowry there may be two, as for Rent upon two Demises, and if one be found for the Abowant, he shall have a Return. habend'.

If the Plaintiff is not satisfied in the whole Rent for which he sues, yet he shall have a Return for so much as is in Arrear. It is true, the Book saith, That the Quantity of the Rent must be agreed in the Pleading, and then if a Dispute happens, how much is in Arrear, and the Defendant avows for more than is due, he shall have a Return.

So where the Defendant avowed for a Rent, and a Nomine Pona for Non-payment of it, but laid no special Demands of the Rent, the Plaintiff was discharged in for the Penalty, because it could not be satisfied without an actual Demand of the Rent; but the Plaintiff in Replevin had a Return, for he had good Cause to distrain for his Rent.

In the Case of Goodman and Ayling, the Court made a Division between a Replevin and a Trespass. It was an Action of Trespass for entering his house, and taking a Chasing-Dish. The Defendant pleaded, That the House was Parcel of a Salt-pen Lord, held of the Earl of Northumberland, as of his Manor of W. by Homage, Fealty, Incorporeum Service, Suit Court, including of the Park with Pasture, and a Pound of Custom Rent, and justified his Entry and Taking for the Rent. The Plaintiff replied, That it was held of another Lord, and traversed, that it was held of the Earl Modo & Forma.

The Jury found, that it was held of the Earl as of his Manor of R. (which was not the Manse set forth in the Avowry) by Homage, Fealty, including of the Park, and the Rent of a Pound of Custom, & non aliter. Here the Verdict did in no Sort agree with the Plea in the Denure, yet Judgment was given for the Defendant; and the Reason was, because it was an Action of Trespass, in which the Substance of the Matter in Question was found, and which was sufficient to excuse the Trespass, viz. the Taking for the Rent; and that the House was held of the Earl: And though it was said in that Case, that it would have been otherwise in an Avowry, for the Avowant ought to make out a Title in omnibus, because the Plaintiff in Replevin is to have a Return; yet that is not an Authority against the Case at Bar, but agrees with it; for this Avowant hath demanded but one Thing, which is Rent, and which is found to be due, though not so much as mentioned in the Declaration: And the true Reason why an Avowant for Services must make out a Title to all, is, because if it be found for him, it will be a perpetual Charge upon the Tenant; but in an Avowry for several Sums of Money due for Rent, it is sufficient if the Substance be found; if that Rent is in Arrear, though not so much as in Demand.

A a a a a

It

Moore 281.
the 8th Reso-
lution in the
Case of Basset
and Tormilham.
Hob. 133.
Hewell's Jam-
bach.
Hob. 208.

Yelv. 148.

Cr. Eliz.
799.

9 H. 7. 3.
 Carthew 386.
 1 Vent. 103.
 Hob. 186.
 Moore 887.
 Cases in Law
 and Equity
 69, 70.
 Carthew 374.
 255.
 2 Cro. 115.

Comber. 307.
 Skin. Rep.
 326.

It hath been objected, That if a Man distrain for Rent due at several Days, which Distress is released, and in an Action of Replevin brought, it appears by his own Shewing, that one Rent is paid, but the other is not, at the Time of the Distress taken, and a Verdict for the Plaintiff, and Damages intire, the Plaintiff shall never have Judgment for the Damages he sustained by releasing those Cattle from him, which he had taken for Rent before it was due.

So in Assumpsit, if two Breaches are assigned, and one is ill assigned, and a Verdict for the Plaintiff, and Damages entire, he shall never recover, because Damages are intended as well for the Breach which is ill assigned, as for the other which is well: From whence they would infer, that in Replevin (as this Case was) because the Defendant had shewed for more Rent than was due, and Damages intire, the Judgment ought to be reversed.

Answer. But Damages in an Abolition are not given in Respect of the Rent for which the Distress was made, but for taking the Cattle, and are given to the Defendant by the Statute 21 H. 8. cap. 19. in such Manner as the Plaintiff should have if he had recovered, which must be for taking the Cattle, and not otherwise, and so shall not vitiate this Judgment.

21 H. 8.
 cap. 19.

It was likewise objected, That by the Judgment in Replevin the Return ought to be irrepleviable, so the Defendant having distrained more than will satisfy the Rent really due at the Time of the Distress taken, shall retain the Surplus by Virtue of this Judgment for Rent which was not then due.

Answer. If the Value of the Cattle be less than the Rent really due, that will be a sufficient Answer to this Objection. The Cattle now taken were of the Value of 40 l. and no more, and the Rent then due was 240 l.

But the Court reversed the Judgment principally for this Reason, and said, That the Abolition, quoad the last half Year's Rent, should have been abated, because it was not due till three Days after the Distress made, and for which the Defendant shewed.

Now by the Judgment in this Action (the Verdict being for the Defendant) the Cattle taken by him are for ever afterwards irrepleviable for two Years Rent and an half, when upon Tender of the two Years Rent, the Man should have his Cattle again, which were kept for such Rent for which they were not taken,

taken, for it was due after the Distress. Judgment reversed nisi.

Anonymus.

Notz. **BY** a private Act of Parliament it was enacted, That if a Trial be had between two Inhabitants of Newcastle upon Tyne, and the Damages not exceeding 40 s. that in such Case the Plaintiff shall have no Judgment, but the Defendant shall have Costs. An Indebitatus Assumpsit was brought, and a Verdict for the Plaintiff, and 30 s. Damages; and the Question was, How the Defendant should have his Costs? And now a Motion was made, that this Matter might be suggested on the Roll; but the Chief Justice said, That the Judge of the inferior Court should have directed the Jury to find for the Defendant.

Woolvil versus Young, & al.

THE Plaintiff declared upon the Custom of England, ff. That if any Person sign a Bill to pay Money as a Day, that by the Custom he ought to pay it upon that Day; and then sets forth, That the Defendants were residentes & negotiantes infra hoc Regnum Angliæ, and that they had signed such a Bill, but did not pay the Money; and upon Demurrer to the Declaration, it was held to be ill, for this Way of Declaring so generally will exclude all Considerations which must be averred.

Every Man is Negotians in the Kingdom, and if the Plaintiff would have brought his Case within the Custom of Merchants, he ought to have said *Commercium habentes*, or have shewed, that the Bill signed was a Bill of Exchange.

It is true, in the Case of Sarsfield and Witherly, the Declaration was, That the Defendant Witherly was *residens & negotians apud London, &c.* without saying *Commercium habens*; but it appeared upon the whole frame of the Declaration, that it was a Bill of Exchange.

Gregory's

Vide 1 Salk. 124, 125, 127.
130, 132.
Vide Ante 13.
See 9 & 10
W. 3. cap. 17.
& 3 & 4 Ann.
cap. 9.
Comber. 227.
Carthew 83,
270.
Comber. 4. 9.
Skin. Rep.
264, 265.
Cases in Law
and Equity,
294, 316.

2 Vent. 295.

Gregory's Case.

See the new
Stat. 7 Geo. 2.
cap. 30. and
my Observa-
tions thereon,
Page 17, 16,
&c.
Vide Ante,
274, 308,
309.

HE was committed by the Commissioners of Bankrupts, for not answering and making a Discovery of his Estate: And now he appearing in Court upon a Habeas Corpus, it was moved that it might be Alled, and that he might be discharged, upon producing Affidavits that he had made a Discovery.

But the Court would not discharge him, for if the Commitment was valid, he may bring an Action of false Imprisonment; and the Court said, That the Commissioners need not ask the Party, whether he will be examined or not: For the Statute gives them Power to examine upon Interrogatories, which they must prepare, and tender to him ready Answer; and this being not returned upon the Habeas Corpus, the Warrant of Commitment, for that Reason, was held void.

Ellis versus Ellis.

Indebitatus Assumpsit was brought against an Executor for 60 l. as well for Money lent, as laid out for the Testator, &c.

The Defendant pleaded, that the Testator was an Infant.

The Plaintiff replied, protesting, that William Ellis, the Testator, was not at that Time an Infant, pro placito; that he laid out Money for Lodging, and for Meat and Drink for himself and Family, and that it was so laid out for Necessaries: And upon Demurrer to this Replication, Judgment was given for the Defendant. For though the Plaintiff had made a good Answer concerning the Money laid out, yet he said nothing to maintain his Declaration for the Money lent.

Brewster versus Kidgil.

THIS was a special Action on the Case upon a signed Issue, by Consent, to settle a Difference between the Grantor and the Grantee of a Rent-charge, concerning the Payment of Taxes.

The Plaintiff declared, that he was seized of a Rent-charge in Fee of 40 l. per Ann. issuing out of the Lands of the Defendant, &c. The Defendant confessed the Seisin, but averred, that it was lawful for him to deduct 4 s. per Pound out of the

said

said Rent for two Years and a half, by Virtue of an Act of Parliament, &c. The Plaintiff avers, That it was not lawful for him to deduct it, and concluded to the Country. The Defendant joins Issue.

Vide 5 Co.
16.
Hard. 87.
2 Browl. 281,
282.
4 Co. 80, 81.

This Cause was tried in Middlesex, and the Jury found a Special Verdict. *I.* That on the 26th of November, which was in the Year 1649, one Robert Langford was seized in Fee of those Lands, and by a Deed of the same Date, for and in Consideration of the Sum of 800 l. paid to him by the said Ellen Brewster, did grant to her and her Heirs 40 l. per Ann. to be issuing out thereof, payable every half Year. There was a Covenant for farther Assurance, on which Deed this Memorandum was endorsed:

A. Memorandum, That it is the true Intent and Meaning of these Presents within written, That the said Ellen Brewster and her Heirs shall be paid the said Rent-Charge of 40 l. per Ann. for ever after, without any Abatement, Deduction, or Defalcation, for or upon Account of any Taxes upon the Lands, or the said Rent.

But it was not proved when this Endorsement was made, or by whom.

Afterwards the said Robert Langford did, by another Deed made in the Year 1652, grant and confirm this Rent-Charge to the said Ellen Brewster and her Heirs, and did covenant therein, That he was seized in Fee of the Lands out of which the said Rent was issuing; that it was free of all Incumbrances; that he had good Right to grant; and that the said yearly Rent, free of all Taxes, shall for ever after be paid to Ellen Brewster and her Heirs.

The Question was, Whether the Endorsement in the first Deed, or the Covenant in the second Deed, is sufficient to discharge the Rent from the Taxes now imposed by Act of Parliament, the first Clause of which Act charges 4 s. per Pound upon Land.

Then there is a Proviso, That nothing shall make void any Agreements between Landlord and Tenant.

In the Statute 3 Will. there is no Provision made for Rent-Charges, but in the latter Acts those are comprehended.

Now a Rent-Charge can be subject to no other but Parliamentary Taxes; it is not contributory to Church, Poor, Sewers, or Highways.

The Words Tax and Tribute are Anonymous, and properly speaking, no other Charge upon Lands is a Tax, but such as is imposed by Parliament, for Sums of Money which are collected

That this is not a Covenant which is taken in this Act of Parliament, because such must be a proper Agreement relating to Parliamentary Taxes only.

The House Tax relates to ordinary Taxes and Duties, such Taxes which are made for Relief of Poor, as by Statute of Commissioners of Works. It is also in the Acts of Parliament which is given by the Statute of H.

It is also named in the Statute of Queen Eliz. and it has been ruled, That an Indenture was made a Rent Charge, and on other Land in the Parish, shall be liable to that Rent for the Poor; therefore there is no Reason to construe this Words to relate to Parliamentary Taxes alone.

And thus as there were the constant Taxes when this Deed was made.

There was nothing like this Covenant in the Original Deed by which this Rent was granted, but in the Deed for further Assurance, and no alteration is found of that first Agreement between the Parties, but these things were inserted in by a Subsequent; therefore it shall not be intended that when an Indenture is made, and a Rent Charge, unless particularly named.

But if it should be otherwise construed, these Words should then extend to all other Taxes but such as were in Being at the making of this Deed, and not to future Taxes; for though the House Tax be a general Word, yet an express Covenant be shown the Parties to free the Rent from all Taxes, shall tie it up to those Taxes alone.

Agreeable to this is the Resolution in Noke's Case, which was, A Man grants and demises a House for Term of Years, (which Words in a Grant import a Covenant in Law) and he covenants for quiet enjoyment against himself and all claiming under him, and gave Bond for Performance of Covenants. An Action of Debt was brought upon this Bond, and the Breach assigned was, That a Stranger had recovered in Ejectment. The Court held, that the express Covenant, which was much narrower than the Covenant in Law, did restrain that Covenant, though it was retained against the Plaintiff in another Point, &c. Because the Plaintiff did not show that the Ejection was not by an older and sufficient Title upon which it was had; for the the Stranger recovered by Law, yet it may be without a Title.

Rep. 1107
1108
1109
1110
1111
1112

2 H. 12
1108
1109
1110

4 Co. 80, 81
Cro. El. 674
Cro. Car. 176
2 Brownl.
213.
Co. Lit. 139.b.

Curia. The Question, whether this Covenant ex vi Termini is to extend to any Imposition to be made by a Law subsequent to that Covenant?

It should have been, All Taxes imposed, or hereafter to be imposed by Act of Parliament.

It cannot be denied, but this Covenant only obliges Langford and his Heirs to pay the Rent chief of all Taxes, and if so, it must extend to such Taxes which shall be given by Act of Parliament.

1. Because where Taxes are mentioned (if the Subject Matter will allow it) it must be intended Taxes by Parliament, which are the most eminent.

This is agreeable to the Opinion of those in former Times, who were conversant in the Affairs of the Exchequer, that a Tax was nothing else but a Subsidy granted by Parliament. There were other Ways of Taxation then in being, as a Fifteenth Part of the Lands or Goods of the Laity. This was called a Quinzime, and granted by Parliament, and was at first set upon the Potts, but afterwards was imposed upon every Town in England, and then the Inhabitants of the respective Towns taxed themselves. The Clergy paid yearly the Tenth of all their Spiritual Livings, and these were called Dismes; but when the Laity paid both Tenth and Fifteenth, that must be understood of Personal Estates, and not arising out of their Lands. The Tenth Part of their Goods in Cities and Borough-Towns, and the Fifteenth Part in the County at large, and this was the ancient Way of taxing the People. Now whilst those Taxes were in being, such a Covenant as this would have no Respect to a Rent-charge, because the Land was always charged, and every Occupier knew what to pay, and the Rent was never charged.

Afterwards there were Subsidies, and those were always granted by Parliament upon urgent Occasions, and were usually set upon the Person in respect of his Lands or Goods, &c. For Lands at 4s. per Pound, for Goods at 2s. 8d. and this Way of taxing began about 39 H. 8. and in those Days if the Tax upon the Land did amount to more than that laid upon Goods, then the Land usually paid the Tax, and Men were then taxed where they lived, and not where they had Land.

Cart. 438.
Comb. 211,
424, 466.
Dyer 32.
Pla. 1.
38 H. 6. 10. b.

34 H. 8.
Brooke Tit.
Quinzime,
Placito 9.

And even in such Case there had been no Occasion of such a Covenant, for the Grantee of a Rent-charge was never liable to pay such Taxes, which were still imposed by Reason of the Land, and this Way of Taxing did continue till the latter End of the Reign of King Charles I.

Then came Assessments of Royal Aids, which were almost the same Thing; and last of all, Pound-Rates.

The Design of the Parties in 1649, was to establish a Rent for ever free from all Taxes; it was in that very Year in which Taxes of this Nature did obtain. If this Covenant had been made in the Year 1640, it would not have extended to this Case, because there were no Taxes then in being, which charged the Land or Personal Estate; but in 1649, the Rent was as much taxed as the Land.

The first Ordinance of Assessment was in February 1642. There was another in February 1644, and another in April 1649. And by this last Ordinance Rents were taxed, and it was in Force when this Covenant was made.

Now tho' these were not real Acts of Parliament, but made in the Times of usurpation, yet they had the same Efficacy; they had Power, but not a legal Power, to which the People did generally submit.

Another Reason why this Rent should be taxed is, because the Grant thereof is in Fee, and it would fall short of that Estate if the Covenant should not extend to future Acts of Parliament.

The Exposition of Statutes is the Subject Matter of this Court; and it cannot be denied that subsequent Acts of Parliament have been expounded to relate to Things done long before the making such Acts: As where there was Tenant in Tail, and for want of Issue by him, the Remainder in Tail to one Basset; the Tenant in Tail before the Statute which enabled him to make a Lease for 21 Years, or three Lives, entered into a Recognizance to him in Remainder, that he would not alter or dispose the Land, but for his own Life; and it was adjudged, that if he made a Lease pursuant to the Statute, it was a Forfeiture of his Recognizance, though made before the Statute.

So is the Reason of Chedington's Case; to whom H. 4. by Letters-Patents granted, That he and his Brethren, and Successors, should be for ever discharged of all Taxes when and as often as the same should be granted to him by the Commons, or a Tenth by the Clergy, and afterwards a Tenth was given to the King by the Clergy. The Collectors of this Revenue, when they came to give up their

Dyer 48. B.
Placito 9.
32 H. 8.
cap. 28.

1 Co. 153 to
156.

19 H. 6.
fol. 62.

C e e c c

Accompts,

Scenarios, say to be witnesses at this matter, because they could not keep the Tench upon the Renter, by Reason of the King's Charter of Exemption. Whereupon Process went out against him, and he pleaded these Letters-Patents, and the Attorney-General demurred; and it was objected by Fortescue the King's Sergeant, that the Grant was void, because the King had not this Revenue at the Time of the Grant made; but the latter Opinion prevailed, That the Grant was good.

So here, though this Covenant was made in general Words long before these Statutes, yet it shall extend to subsequent Provisions made by Act of Parliament.

It hath been objected, That tho' it may extend to Taxes given to the Crown by Way of Assessment, yet it cannot to those not Taxes.

But these Taxations differ not in Substance, but in Form; for Taxes and Assessments are of the same Nature, and the same Things are taxed by both, as Rents as well as Lands.

Coria. The Court did not like this Way of trying Causes by Writings: And they were of Opinion, That the Plaintiff had no Remedy at Law upon this Covenant against the now Defendant, for he was only a Ter-tenant, and could not be charged as Assignee; because the Covenant did not run with the Land, neither was it annexed to the Thing granted; and therefore he ought to bring an Action against the Grantor, by his Deeds; for this Covenant both not extend to any Thing or Parcel of the Demise; but to Taxes which had not Existence at that Time, and is for that Reason a personal Covenant, by which the Debt may be charged in Reason of Assigns descended, and not otherwise. He might have Remedy in Equity against the Assigner, but not at Law, for that would be to make this Covenant of as high a Nature as a Warrantia Charta.

7 Rep. 16.
Spenner's
Case.
Hard. 87.
Cook ver.
Earl of
Arundel.

Vide 1 Sal.
250, 251.

Mandamus to grant Administration.

A Mandamus was granted last Term to the Judge of the Spiritual Court, to grant Administration to J. S. who, as he appeared, was next of Kin to the Intestate.

Nothing moved for a Superfideas to it, for that the fact was, That J. S. being once, refused to come in; upon which an Order of the Court was made for Administration, but was opposed in it by one who pretended there was a claim. Which matter was now under

under Controversy before the Judge there; and therefore that that was determined, the Spiritual Judge could not give the Mandamus.

Shower. You commonly grant a Mandamus to the Judges of the Spiritual Court, upon suggestion, that J. S. has refused, and that J. S. is next a King, and if it be true, they must take Issue upon it; and so they may do in this Case.

Holt, Chief Justice. Is there no Difference between a Controversy, and no Controversy? When there is no Controversy, we do so; but here is a Controversy, and he will not grant a Mandamus till it be determined. For suppose the Court should prove good, what then will the granting Administration signify?

If there be a Controversy in the Spiritual Court, no Mandamus will it be determined. Comb. 454.

Sutton *versus* Moody.

S. C. 2 Salk. 356.

Fleip. **ACTION** was brought for breaking the Defendant's Close, and hunting his Conies, &c.

Trespass for hunting Conies.

Gould, Serjeant, moved in Arrest of Judgment, That no Action will lie for hunting Conies which are *Fera Nature*, and so is Greenhill's Case, 1 Cro. 553. As to Deer in a Park, and Conies in a Warren, the Owner hath a special Property in them as long as they are in the Warren or Park: but if they be not in a Park or Warren, he may not lay Seas, unless he can show that they were Domestic: Indeed, had it been Warrenhamium, it might have been good; but now as it is laid, there can be no Property presumed.

Comb. 11, 118. S. C. 464. Vent. 322. Rast. 490. b. Regist. 93. 26 H. 6. 39. b.

Recontra. We take it to be good enough. In Rast. 450. b. and in the Regist. 93. b. there is an Action for breaking the Close, and taking away his Sparrows, &c. and certainly they are as wild as Conies: So is Theil. Dig. 196. 25 H. 8. 39. b. In Jo. 440. and 1 Cro. 553. Greenhill's Case, with not come up to this Case, for it must be meant, if they are not in the Plaintiff's Close, then no Action lies. So in Ventris, where Pices flos copit in sepeali Pischaria, moved in Arrest of Judgment, that the Plaintiff ought not to have called them Pices flos, unless they had been in a Stream or Pond. Sed non alloc. After which it shall be intended they were in a Stream or Pond, but it had been found upon Demurrer; it was good by Reason of total Property; and then this

Ca. in Law and Equ. 23, 37. Carth. 285, 286.

this being after a Verdict, it shall be presumed the Plaintiff made a Property.

1 Cro. 388.
1 Bal. 405.
Rayn. 16.
Yelv. 104.
5 Co. 404. b.
7 Co. 17. b.
Cro. Jac. 193.
229, 230.
1 Cro. 387.
388, 153.
554.

C. J. The Conies are as much his in his own Ground as if they were in a Warren, and the Property is Rationi loci; the Warren does not give a greater Property. So in the Book of 12 H. 2. 10. If a Man starts an Hare in his own Ground, he has a Property in it, Rationi loci. Indeed if the Deer escape out of a Park into the neighbouring Ground, you have no longer a Property.

Gould, Serj. As for the Case of the Hawks, there was a Property Ratione impotentie.

Rokeby, Just. Here is a Verdict, and it was in his own Close, and why should any Man come there?

Ch. Just. If the Declaration had been Cuniculos generally, you say he should recover Damages: And why in that Case, if not in Respect of the Conies? Leave out Icos, and the Jury may give Damages. Perhaps these Rabbits were for the Sustenance of his Family; and why should you deprive him of it?

S. C. 1 Salk.
320.
Vide 6 Mod.
292.
Two Writs of
F. Fac. deliver-
ed to the Sher-
riff the same
Day, and the
last was exe-
cuted first.
29 Car. 2.
a. 13.
Carr. 419.
420.

Smallcomb and Buckingham.

HERE were Two Writs of F. Fac. delivered to the Sheriff the same Day; Ours was delivered first, which we say bound the Property. Indeed, before the late Statute of Frauds and Perjuries, at Common Law if the Writ that had the last Teste had been delivered first, yet the Writ that had the first Teste must take Place, as it is in 3 Cro. 174. and if the Lands are charged by the Delivery of the Writ, no Doubt but the Sheriff may sell the Goods. Now suppose, after the Sale of the Goods by F. Fac. the King's Writ comes, the Goods may be seized again for the King; for it can be no Conclusion of Execution to the Sheriff.

Statute of
Frauds and
Perjuries.
Comb. 428,
452.
1 Sid. 275.
Skin. Rep. 257.

Now by the late Statute of Frauds and Perjuries, the Question is, Whether there shall be a Session in a Day? for the Statute saith, Time of the Delivery, but not the Day of the Delivery. So Writ of Fieri Facias, or other Writ of Execution, shall bind the Property of the Goods, but from the Time that such Writ shall be delivered to the Sheriff, &c. and for the Consideration of the Time, shall endorse the Day when they re-
ceived

reised the same. Suppose the Sheriff makes an Indorsement, yet the Parties are not concluded; but the marching it is only directory to the Sheriff.

I agree, there is no Division of a Day, unless in Case of Necessity; as in Co. Lit. 135. and 6 Co. 33. b. where there was Priority of an Infant.

If twenty-four Hours must be the whole Term, then we are in the Middle; but if only the day Time of its Delivery, then with Execution, our Court ought to take Place, it having been first delivered. 1 Sid. 372. Cro. Eliz. 440. 3 Keb. 397. Parties are liable to Execution from the Time of the Teffe of the Fieri Facias, and that this shall be said Emanatio Brevis. Bayly and Bunning.

Shower. If the King's Writ of Execut comes out after Execution, yet it is superfluous, and the King's Court shall take up the Goods; but if the Sheriff had sold the Goods by Bill of Sale, &c. the Property is altered, and shall not be divided by the King's Writ.

So here are two Writs indorsed the same Day, and the Sheriff having made the Bill of Sale to us, is thereby concluded.

Holt, Chief Justice. This is a Case of some Concern, and it is in that the Law shall be settled, and it is worthy Consideration. Indeed, here was an honest Sale, you put in the Writ and let it lie longer; then comes the other and brings the Writ the same Day, and calls for a Warrant presently, and is given a Bill of Sale, and executes it honestly; and now you would reject it.

C. J. At another Day.

Though the Fieri Facias was delivered; yet, said the Party to the Sheriff, you may let it lie, it requires no Date: and therefore desires no Warrant, nor renders any Fee. Then when a second Fieri Facias comes out the same Day, upon which the Sheriff presently grants, and makes a Bill of Sale of the Goods, the Sale shall be good, and shall not be avoided. Tho' the second Fieri Facias was delivered a Fortnight after, yet if it be the first executed, it shall be good, and the Party has only his Remedy against the Sheriff.

D d d d d

Winter

Vide 1 Co.
76, 174.
Owen 126.
Cro. Eliz.

724, 992.
2 And. 131.

Ray 142.

Comber. 452.

Latter Fieri
Facias first
executed.

Winter *versus* Loveday.

Resolutio Curie.

S. G. Ann.
246/445Vide 6 Mod.
30. 101. 102.
Rayn. 132.
Poph. 9.
Yar. 222.
Lutw. 269.
Moore 494.
Carthew 427.
428. S. G.
2 Bull. 337.
S. G.

THE Case upon a Special Verdict in this is thus: George Pawlet makes a Declaration on Marriage, in which there is this Power, That it should be lawful for the said George Pawlet, during his Life, to make Leases of the said Lands, for the Term of three Lives in Possession, or for the Term of thirty Years, or for any other Term or Number of Years, for one, two, or three Lives in Reversion, and so that it be not of ancient Demesne Lands: And the Lands which were leased, in Pursuance of this Power, were Copyhold Lands, and made for thirty Years, and by ought appears, were in the Hands of the Tenants at that Time, and if so, then they could not be leased out in Possession.

Eyre, Justice. Upon this Case two Questions do arise:

Power to
make Leases.
Fitzg. 176.
177.

Quest. 1. Whether George Pawlet had Power to make a Lease for thirty Years, or any other Term, determinable on one, two, or three Lives? And this is clear he had such Power.

Vide 6 Mod.
30.

It seems to me, that here are distinct Clauses: the Words [Or for any other Term or Years, &c.] do plainly describe another Estate; so that he should have Power to make a Lease for thirty Years, or to make a Lease for any Term determinable upon Lives.

Two Writings
of the Court
of the Court

There is a Difference; where a Man hath a Power to make a Lease indefinitely, there he shall not make a Lease upon a Lease, or, but where a Power both express what Lease he shall make, as a Lease in Possession, or in Reversion, there he may make it

General Power
unlimited, how
to be construed.

as a Lease in Possession, or in Reversion, there he may make it indefinitely. Yelv. 222. Upon a general Power to make Leases, without more saying, the Law shall stand, that they ought to be Leases in Possession; for if by such Power he may make a Lease upon a Lease, he might make Leases in infinitum, and detain them in Reversion from the Possession for ever, which is contrary to the Intent of the Parties, and against all Reason.

Coulter, 271.

Quest. 2. Whether he could make such a Lease of these Lands which are Copyhold, for that Demesne Lands are excepted? As that if the Lands in Question are Parcel of the Demesne Lands, this Lease cannot be good.

Now if they were Copyhold Lands, they must be Parcel of the Manor, since the Freehold is in the Lord, and in Law they are but Tenants at Will till, and so is Lit. Sect. 553.

Therefore upon this second Point, I hold that this Lease is not warranted by the Power. And that for this Reason, Judgment ought to be for the Plaintiff.

Turton, Justice. I do concur with my Brother that spoke last, that this Lease, under which the Defendants claim, is not warranted by the Power.

First, I take it, that George Pawlet had a Power to make a Lease for thirty Years absolutely; and it seems to me, that the Intention was, he should have such a Power, as all such Estates would have been altogether insignificant, and the Words, [Or for any other Term,] would have been sufficient of themselves, and if it should have been for thirty Years, for ever, or, for three Lives, it would have been too strong.

Now the next Question is, Whether these Lands, being Copyhold Lands, could be devised, for that in Judgment of Law Copyhold Lands are Parcel of the Demisees? So is it last. — And if Copyholds are Parcel of the Demisees, then they are out of the Power.

The next Thing I go upon, is upon the Marriage-Settlement, and the Consideration is a Portion of 2000l. and therefore it shall be taken strictly against George Pawlet.

Then it cannot be presumed, that it was the Intent of the Parties, that ancient Copyhold Customs should be destroyed; and the Will here was to have such a Power, though he had but a Jointure.

Besides, here were other Lands upon which the Power might have been exercised.

Upon the whole, I am of Opinion, that Judgment must be for the Plaintiff.

Robby, Justice. I do concur, that this Lease is not warranted by this Power.

All Powers ought to observe two Rules:

1. The Constitution of these Powers ought to be interpreted according to the Intent of the Parties.

2. The

Two Rules
of Powers
Cases in Law
and Equity,
446, 467,
475, 477

Mod. Cases in
Law and E-
quity, Part 1.
249, 381.

Raym. 132.
Yelv. 222.
Lew. 249.
Moore 424.
Cro. Jac. 318.
428. 25.
254. 257.
258.

Vide Cro.
Jac. 318.
Poph. 2.
Cro. Jac. 318.
Lew. 249.
Browl. 149.
Raym. 132.
Construction
of Powers to
make Leases.

The Powers must be strictly pursued. As for the Intention of the Parties, it seems to me that the Intention was not to take away the Copyhold Tenures, and so to have destroyed the Estates, and it is evident that Copyhold Lands are Parcel of the Demelness of a Manor.

I take it, that whatever Number of Years the Lease was made for, it was to be subject to a Determinability of Life or Years; for the its quod, &c. seems to take Care, that the Owners of the Fee should still have a Determiner in their Families. The Fee itself of the Copyhold is still in the Lord, and the Copyhold itself is only at Will.

The Estate (for any other Term or Number of Years) had no Weight with me, for it cannot be intended to be of the same Duration, both in Possession and in Reversion.

The Case in Yelv. 222. and in Cro. Jac. 318. Shecomb and Hyndman was a special Matter. Counsel in favor of the Plaintiff took this then in Reversion, made a Fine there- after the Plaintiff himself for Life, and then to the Use of his Right Wife in Full, without any other Words to determine the Estate at any Time for twenty-one Years. Before the Lease in Being expired, he made another Lease to J. B. (under which the Defendant claims) for twenty-one Years, to begin when the Determination of the former Lease, and so on. The first Lease expired, the Defendant entered, and made a Lease to the Plaintiff, and so on, making a Lease to the Plaintiff, for twenty-one Years, to begin when the former Lease in Possession, and so on, in Reversion to J. B. in Full, or Reversion, after another Estate determined, for then he might by infinite Leases make a Lease in Reversion out of Possession for a long Time, against all Reason. 6 Rep. Fol. 33. Lesper and Wood's Case, cited in Rowland's Case. There was a Power, to make Leases for twenty-one Years, and afterwards he made the Power, 3 April, makes a Lease for twenty-one Years, to com- mence at the Feast of St. Michael next ensuing. And al- though the Power was general, to make Leases for twenty-one Years, without any Restraint to make them in Possession, or any Number of them, yet it was adjudged, that the said Lease was void; for that it was by the said Power, he might make a Lease in Futuro, or a Lease in Reversion, and he might make a Lease for twenty- one Years in Possession, yet after that infinite other Leases, &c.

These

These Cases are full to confirm me in my Opinion, and I hold Judgment to be for the Plaintiff.

Ch. Just. Putting put the Case, ut supra;

The general Question is, Whether this be a good Lease by Virtue of this Power? And I am of Opinion, that this is not a good Lease.

The first Question is, Whether this Term be within the Power? And I hold, that it is a Term within the Power, and this depends on the meaning of the Words of this Power. Now in a large Sense, any Lease made to commence at a Day to come, may be called a Lease in Reversion, but that is not meant in this Case, but the Lease here is rather to be taken in the common Sense, from and after a present Interest then in Being, and the Power extends not only to a Lease for Years in Reversion, but also to a Lease for Life in Reversion; and if it is for Life, it is a concurrent Interest.

But now I take it, as this Power is penn'd, he may make a Lease for thirty Years in Reversion absolute; for the Clauses are dilin'd to make a Lease for thirty Years, or else for any other Term of Years determinable on one, two, or three Lives; so that this Word [or] disjoins what follows, and makes it a distinct Question to the precedent Matter. So is 6 Rep. 99 Finch's Case.

But whether this Copyhold Lease was in Being at that Time is uncertain; and if it was, had Power to make a Lease in Possession or Reversion, he cannot do both.

Now as to the second Question, Whether this Power does extend to make Leases of the Copyholds? I do think that this Power extends not to a Copyhold Estate; for I agree with my Brother Roby, that it was never intended that this Power should extend to Copyholds, for it was not their Design to de-

stroy the Manor.

All the Demesnes of the Manor are expressly excepted out of this Power.

The Coppelholds are Part of the Demesnes.

Ergo, Coppelholds are expressly excepted out of this Power.

Coppelhold,
Parcel of the
Demesne.
Manor, what
it must con-
sist of.
3 Bull. 14.
1 Rol. Rep.
142.
2 Rol. Rep.
180.
Skin. Rep. 192.
Carth. 427.

That the Coppelholds are Parcel of the Demesne, is so plain, that there needs no Authority to be quoted but Alton Wood's Case, 1 Rep. 46. b. and that is express. And it is obvious that every Manor must consist of Demesne and Services, and those are sufficient to support the Being of a Manor, for if the Lord of a Manor alien his Mansion-house which he had in Possession, yet if the Coppelholds and Services remain, it is still a good Manor. Then there was no Occasion that this Power should extend to Coppelholds. Indeed, it was objected by Sir B. Shower, that if you confine this to extend to Coppelholds, there are no other Lands to be demised. One of my Brothers has answered, That there were other Lands within the Parish which might have been demised.

But that will not do, for the Land to be devised must be Parcel of the Manor.

As to this I answer, That this Power has Subject Matter enough to exert itself upon, for he may make Leases in the Manor of the Rents and Services; and though it be said, reserving the antient Rent, and that no Rent can be reserved out of the Rents and Services, yet that signifies nothing, for tho' the Qualification cannot be observed, yet the Power may still be executed in so far as it may be performed, 12 Rol. Abr. 262. Dependence of others Manors and Lands to the Use of J. S. for Life, &c. with Power to make Leases of all, or any Part thereof, for three Lives, &c. In quod, That such Rent, or more, be reserved upon every Lease, which was reserved, or paid for it, within two Years then next before; and some of the Land was not leased before at any Rent within the two Years, he may by Force of this Power make such Lease of this Land, reserving what Rent he pleases. *Cumbeftord's Case*. And though the Words of the Qualification be general, yet the Application may be particular. *Hill. 27 & 28 Car. 2.* In *Walker and Web's Case*, the Lease for Lives was held good, without reserving any Rent, and yet the Power was to reserve Rent.

Reserving the
antient Rent.

The 'the Qual-
ification be
general, yet
the Appli-
cation may be
particular.

Now

Now indeed, if this Exception had separated the Demesnes from the Rents and Services, it would have been hard to have made such a Construction.

So that upon the whole Matter, I hold,

1. That this Lease for thirty Years absolutely, is a good Lease within the Power.

2. That these Lands being Part of the Demesnes, were within the Exception.

Judgment for the Plaintiff.

D E

D E

Term. Sancti Hill.

Anno 9 W. 3. in B. R. 1692.

Trevillian *versus* Andrew.

Ejectment. The Jury find a Lease for ninety-nine Years, if three Persons so long live, and that one of the Lives was in Being.

They find another Lease made to the Lessee for ninety-nine Years, if he lived so long, and that he assigned his Term to the other, who died intestate, and that this Person was living.

Spy, who had a Grant of the Reversion, entered before Administration de bonis non was granted, and died seized. The Question was, Whether that had taken away the Entry of the Administrator?

Curia. The Term had an Existence as soon as Administration was granted, and the Administrator may have a special Action of Trespass.

See 4 Geo. 2.
c. 28.

Nota. It was held, That if a Lessee hold over his Term, you cannot bring an Action of Trespass without an actual Entry.

Mathew *versus* Tompson.

Vaugh. 28.
2 Jones 27.
Vide ante
210, 211.

Ejectment for the Site of the late Priory of Leoffield, upon the Demise of Thomas Earl of Suffex. Upon Not guilty pleaded, there was a Trial at Bar by a Jury of the County of Bucks,

Bucks, and the Plaintiff's Title appeared to be thus: *ff.* The Lands now in Question were formerly the Lands of Sir Arthur Throgmorton, who had Issue four Daughters; the eldest and the youngest were out of this Case; Anne the second Daughter married Sir Peter Temple, and in Consideration of that Marriage, Sir Arthur Throgmorton, Anno 12 Jacobi 1. settles these Lands in Trust for himself for Life, then to Dame Anne his Wife for Life; then to Sir Peter, and Anne his Wife, for their Lives, and the Life of the Survivor; and after their Decease, then to Trustees to preserve contingent Remainders; then to the first Son of the Body of Anne by the said Sir Peter begotten, or to be begotten, and the Heirs Males of the Body of such first Son; and for want of such Issue, then to the Use of all the Issue Female of the Body of the said Anne, by the said Sir Peter begotten, and to the Heirs of the Bodies of such Issue Female, like Remainders to her Issue by any other Husband, Remainders to Elizabeth his third Daughter, and the Heirs of her Body.

Vide 1 Salk.
285.
6 Mod. 44,
45.

Sir Peter Temple died without Issue Male, but left two Daughters; Anne, who was the Lady Baltinglasse; and Martha, who died very young; but were both born before the particular Estate determined, otherwise the Remainder had vested in the elder.

These Sisters were Jointenants for Life, with several Inheritances; and the Lady Baltinglasse enjoyed the whole for forty Years by Survivorship, and died in August 1696, without Issue.

6 Mod. 44, 45.

So that the Lands must now come to the Heirs of the Body of Elizabeth, who married Thomas Lord Dacres, by whom she had Issue Francis, who had Issue Thomas the Lessor of the Plaintiff.

There having been some Opinions formerly, that my Lady Baltinglasse was Tenant in Tail, by Virtue of this Settlement, she suffered a Common Recovery to bar the Remainders; and to maintain this Opinion it was now said at the Bar, that the Remainder did attach in her, and could not be divested by the subsequent Birth of her younger Sister, for the Words, *ff.* To the Use of all the Issue Female of the said Anne, by Sir Peter, and the Heirs of their Bodies, are Words of Limitation, and not of Purchase; but if they should be adjudged Words of Purchase, then the Estate-Tail is vested in the eldest Daughter.

It is true, if there had been two Issues Female living at the Time of the making this Settlement, it would have made them

F f f f f

Join.

Jointenants for Life, with several Inheritances; but this being upon a Marriage Settlement, before any Issue born, alters the Case.

The Birth of the youngest Daughter cannot make her Jointenant with the other, for the Possession was coupled with the Remainder. If it should be otherwise, then these Sisters will take by Parcels, which cannot be; for admitting the eldest Sister should have Children, and live many Years, and then die, and afterwards a younger Sister is born, of what Estate can the eldest Sister die seized?

But the Court were unanimous of another Opinion.

Then the Plaintiff was put to prove his Title, but could not produce the Original Settlement made by Sir Arthur Throgmorton, of which he gave this Evidence:

Vide ante

211.

6 Mod. 149,

225, 248.

2 Lev. 108,

109.

1 Mod. 4,

94, 114.

He proved, that it came to the Hands of the Lady Baltin-glasse, and she having committed a Forfeiture, by suffering a Recovery, brought the Deed to Mr. Grange, to advise with him in that Matter.

He proved likewise, that this Deed was produced before a Master in Chancery, in a Suit there depending, and a Copy of it made, but that my Lady got the Copy away.

He proved also, that there was a Trial at Law upon a Power of making Leases, at which Trial that Copy was produced, and a special Verdict found, in which this Settlement was set forth in hæc Verba, the Record of which Verdict was now produced in Court.

That there was likewise another Controversy upon a Lease made of this Land, and a Bill in Chancery exhibited against my Lady Baltinglasse, in which this Settlement was set forth, and which my Lady admitted in her Answer; and upon this Proof, my Lord Sussex had a Verdict for a Polety.

S. C. 2 Salk.
467.

Sanders *versus* Owen.

WRIT of Error to reverse a Judgment in the Common Pleas, in an Assize of Novel Disseisin for the Office of Clerk of the Peace of the County of Kent.

Upon Non disseisavit pleaded, the Recognitors find a special Verdict, ff. That Heneage Earl of Winchelsea was Custos Rotulorum of that County, to whom of Right it doth belong to constitute the Clerk of the Peace.

Comb. 317.
S. C. 209,
210.

They

They find the Act 1 Gulielmi, by which the Custos, or other Person to whom of Right it doth belong, shall from Time to Time nominate the Clerk of the Peace. 1 W. & M. Sess. 1. c. 21.

That this Office being vacant, the said Earl, by Writing under his Hand, did constitute Philip Owen to be Clerk of the Peace, to exercise the said Office either by himself or Deputy; which Writing they find in hæc verba.

That at an adjourned Sessions at Canterbury, this Writing was read in Court, and there the said Earl, without any Relation to his former Grant, did, viva voce, say, I appointed Philip Owen to be Clerk of the Peace according to Act of Parliament. Carth. 426.

That the Earl of Winchelsea died, and that the Earl of Rumney was made Custos, who appointed the Plaintiff to be Clerk of the Peace, and that he was a fit Person. There was a Judgment for him in the Common Pleas, and a Writ of Error now brought.

It was insisted for the Plaintiff in Error, That no Title was found for the Plaintiff; for he brought an Amze for an Office at Maidstone, and doth not say, that Maidstone is in Kent, so it is ill in Substance, and no Venue; and the Court cannot judicially take Notice that Maidstone is in Kent.

Then as to his Title, the Pretences are two:

1. By Grant.
2. By parol Declaration.

As to the first, he had no Title by the Grant.

Then as to the parol Appointment, there is no such Thing found, for the Words being spoken at the very Time the Grant was read in Court, must have Reference to that; and it is all but one Act.

It doth not mention either what Estate the Person shall have in the Office, or in what County he should be Clerk of the Peace, or according to what Act of Parliament; for both the Statutes of H. 8. and Edw. 6. and 1 Will. are all in Being, and do all concern this Office. So that there is very great Uncertainty in this Nomination. 37 H. 8. c. 1.

If I grant Land to another, without mentioning what Estate, it is a Tenancy at Will.

He might nominate a Man to be Clerk of the Peace, according to an Act of Parliament, and never intend to give him such an Estate as directed by the Act.

It

It was the Earl of Winchelsea's Intention, that Philip Owen should have the Place; but it doth not appear, that he intended it for him during Life.

Noy 147,
148.

I do appoint *Philip Owen*, &c. These Words do amount to no more than Evidence of a Nomination; but it is not a Nomination itself, like the Case in Noy, where it was held, That a Resignation to a Proctor, doth not make the Church void, without the Acceptance by the Bishop; and the Jury found an Instrument under the Seal of the Bishop, upon which there is an Endorsement, that the Resignation was accepted by him. This was held to be no finding of an absolute Resignation in fact.

So in the Case of a nuncupative Will, it is not sufficient that the Jury find, that the Testator dixit; but they must find, that he intended it to be his Will, or that he spoke the Words animo testandi.

It doth not appear that the Earl spoke these Words, Animo constituendi; therefore they ought to find so much as may amount to fulfil his Intent.

No Freehold of an Office can pass at Common Law without a Deed or Writing, it might be supplied by Liberty: But that is not found in this Case.

This Office cannot be distinguished from any other, for it is incorporeal, and therefore must pass by one of those Ways.

Ray, an Ale, after it was turned into an Estate by the Statute of Hen. 8. could not be granted by Parol.

The Statute of 1 Will. makes no Alteration as to the Constitution, but as to the Qualification of the Person, and Duration of his Estate; it directs the Custos to give the Office to the Clerk of the Peace, quam diu se bene gesserit; it was to make him independent on the Custos, who had an Authority to grant him such an Estate.

Now when the Statute requires a Thing to be done, and doth not direct in what Manner, it must be according to the Course of the Common Law, and by that Law no Freehold can pass by an Act executed in the Life-time of the Person, without Deed in Writing.

And this appears by Cases of the like Nature, viz. All Commitments by Justices of the Peace must be in Writing, except upon a sudden Alarm in their View by a Court of Sessions.

A parol Assignment of Commissioners of Bankrupts is not good.

Econtra.

Econtra.

As to the first Objection, Maidstone will refer to Kent in the Margin.

The Question is, Whether this is a bare Authority, or an Interest claimed under the Custos?

And it was insisted, that it was a bare Authority, but the Nominee had his Interest in the Office by Act of Parliament: And this appears by the Nature of the Office itself, for the Custos has but an Interest at Will in it; and therefore the Clerk of the Peace cannot have a larger Interest from the Custos than he had himself in the Office, out of which the Clerk's Place is derived.

It is like a Power given to a Man to make Leases; as soon as the Lease is made, the Lessee is in by Virtue of the Grant, and not by the Person who made the Lease.

It is true, that Things which lie in Grant cannot pass without Deed, which is an Instrument that the Law hath provided instead of Libery. So where a Man claims a Right to an Office, it must be by Deed; but this is an Authority which may execute by Parol, and then it is otherwise.

And though it is only an Authority, yet the Custos may lawfully give such an Estate as he hath done: As if a Man devise, that his Executors shall sell his Estate; this is an Authority, and no more, and yet when the Estate is sold, the Vendee is in by the Will.

Co. Litt.
181. b.

The Office of Register of the Court of Admiralty may be granted by Parol, according to Custom.

The Statute of Hen. 8. saith, Give, Grant, Nominate, and Appoint; and doth not shew in what Manner. So that in this Case the Nomination is the same Thing with Writing, for both are only to signify the Man. Adjourn.

Hawkins's Case.

THE Church-wardens of the Parish of St. Edmond's on the Bridge in Exeter, libelled against Hawkins, setting forth an ancient Custom within that Parish, That the adorning the Inside of the Chancel hath been done and performed by the Church-wardens, at the publick Charge of the Owners and Occupiers of ancient Houses within the Parish, by a Rate to be made by the said Church-wardens, by and with the Consent of

Vide 1 Vent.
367.
1 Mod. 79.
194, 236, 261.
4 Mod. 148.
2 Jones 122.
Post. 447.
Comber. 132.
Carthew 360.
S. C.

G G G G G

the

the major Part of the Parishioners, having Respect to the annual Value of the Houses.

Wide Hard.

379.

5 Co. 66, 67.

Cro. Eliz. 659.

2 Jones 122.

1 Mod. 79.

194, 236,

261.

Raym. 246.

Comber. 148,

344.

That the Chancellor wanted Reparations and Ornaments, and that the Church-wardens, by the Consent of the major Part, &c. did make a Rate, which was confirmed by the Bishop, by which Hawkins was rated 17l. 1s. for Walls and Ricks within the said Parish, which was his due Proportion according to the yearly Value of the Houses there; and that he had not paid the same.

The Defendant suggested for a Prohibition, that the Parishioners ought not to contribute to the Repairs, and the adorning the Inside of the Chancel, and denied the Custom, and that the Rate was not made by the major Part of the Parish.

The first Issue is found for the Plaintiff, That there is such a Custom. And the second Issue was found against him, viz. That the Rate was not made by the major Part of the Parishioners.

Carthew 143.

Comber. 298.

Cases in Law

and Equity

12, 64, 385,

386, 439,

440.

It was moved in Arrest of Judgment, and that a Contadation might be granted, because the Spiritual Court having the original Jurisdiction of Reparations of Churches, must likewise have the same Jurisdiction of all the Incidents thereunto belonging, as Rates, &c. and the Clerk cannot stand in the way, for the Trial is held, because the Matter was not triable at Law; and therefore the Jurisdiction is still saved.

If a Plea Ne unques accouple should be tried at the Assizes, neither Party would be concluded by a Clerk upon that Issue.

If there had been any Inequality in the Rate, it might have been tried at Law; but whether a Rate or not, belongs to another Jurisdiction.

Yelv. 172.

Starkey *versus*

Barton, and

Gore.

Raym. 246.

March 73.

2 Roll. Abr.

298, 299.

Hob. 12.

12 Rep. 65.

Hesley 87.

2 Inst. 608.

Limv. 174.

Sid. 161.

1 Inst. 6. l.

And to prove, that where the original Matter is of Ecclesiastical Cognizance, all the Dependents thereon are so likewise, there was a Case cited, Hill. 7 Jacobi, in this Court, where the Church-wardens libelled against a Parishioner for a Church Tax, but the Sentence was against them. Whereupon they appealed to the Metropolitan, and pending that Appeal, one of them gave the Parishioner a Release of all Actions and Demands; the other still proceeding to reverse the Sentence, the Parishioner moved for a Prohibition, suggesting this Release; and upon Demurrer it was held to be no Cause for a Prohibition, because the principal Matter was merely Spiritual; and therefore the Temporal Court would not determine, whether the Release, which was dependant upon it, was a *Wae* or not?

And

And for this Reason, though Part of the Issue be found against the Plaintiff, yet he shall have Judgment notwithstanding; as where the Defendant avowed for Rent, supposing that one Vavisor was seized in Fee of the Locus in quo, &c. and granted the Rent; and upon Non concessit pleaded, it was found specially, that another Person was seized and made a Lease to this Vavisor, who granted the Rent. Now it happened that this Lease was determined before the Distress taken; and therefore, though the Issue be found for the Avowant, quod Vavisor concessit, yet the Issue being determined out of which the Rent was supposed to be granted, the Court gave Judgment for the Plaintiff, though the Issue was found against him.

2 Cro. 442.
Harrison ver-
sus Metcalf.

Econtra.

No Man can say, that the Parishioners ought of Common Right to repair the Chancel; there must be either a Custom or Prescription to charge them.

There are two Reasons why the Defendant cannot be charged in this Case:

1. They alledge a Custom, for Owners and Occupiers of ancient Houses to be contributory to the Ornaments of the Chancel; but they have not brought the Defendant to be within the Custom, for they do not charge him in respect of Houses, but for Racks and Mills. Now if a Mill should be construed to be a House, yet a Rack is not.

2. The Charge for and towards the Ornaments of a Church or Chancel is a personal Charge, and shall never be imposed upon the Lands of the Parishioners, but upon the Inhabitants themselves: If it had been for the Repairs of the Church, there the Land is liable to be rated; but this Rate cannot be good, because it is made for him to pay so much for Ornaments in Proportion to the yearly Value of his Racks and Mills.

2 Roll. Rep.
262, 270.
2 Roll. Abr.
291. K.
Ante 68.
Post 393.
452.

Curia. Without a special Custom, the Parishioners are not to repair the Chancel; the Parson is bound to do it of common Right; but where a temporal Inheritance is to be charged by a particular Custom, the Church-Wardens must bring the Defendant within the Custom, otherwise it is not good; for it is the Custom which gives the Jurisdiction.

Now in this Case, the Custom was alledged for Owners of Houses to repair, and they have rated the Defendant as Owner of a Mill, which cannot be intended a House; for in a Precipe

quod

quod reddat, a Mill cannot be demanded by the Name of Domus, but it must be De molendino. Adjourn.

Anonymus.

5 & 6 W. &
M. cap. 21.

BY an Act for granting to their Majesties several Duties upon Parchment, Paper, &c. It is enacted, That 6d. shall be paid for every Piece of Parchment on which any common Bail shall be filed, and on which an Appearance shall be made upon such Bail: Which Appearance or common Bail, the Defendant shall cause to be entered or filed in eight Days after the Return of the Process, on Pain of 5l. to be paid to the Plaintiff, for which the Court shall immediately give Judgment, and the Plaintiff take out Execution. The Writ and Return was brought into Court, and a Certificate from the proper Officer, that common Bail was not filed within eight Days, &c. Upon which a Motion was made, and the Court gave Judgment Nisi, &c.

D E

D E

Termino Paschæ.

Anno 10 W. 3. in B. R. 1698.

Rex versus Stainford.

THE Defendant was indicted, for that he on the 19th of June, &c. and before, being an Inhabitant at a Town in Derbyshire, was summoned to watch with one Booth a Constable, and that he obstinately, contemptuously, and maliciously made Default. Exceptions were taken.

Vide 1 Mod.
73.
1 Sid. 218.
2 Keb. 713.
2 Sann. 423.
Anre 68.
Comb. 243.

1. He saith, That he was an Inhabitant the 19th of June, and before, and doth not say that he continued to be so.

2. Doth not say, That Notice was given to him to watch within the Parish.

3. Saith, He did not watch with one Booth a Constable; he ought to have said he did not watch at all, for possibly he might watch that Night with another Constable.

Econtra.

This Indictment is founded at Common Law and not upon the Statute of Winton. And as to the second Exception, it is said he was summoned to watch with the Constable, but doth not say within the Parish. Now there may be a Place Extra-parochial, where the Constable is to watch.

H h h h h

As

As to the other Exceptions nothing was said.

Curia. Demur to the Indisment. They would not quash it.

B. C. 1 Salk.
12. post 407
to 410.

Saville *ver.* Roberts. Trin. 9 W. Rot. 724.

Vide 2 Mod.
306.
6 Mod. 30,
90, 157.
185, 169.
Bridg. 131.
Ca. in Law
and Equ. 147,
149, 210,
217, 219.

THE now Plaintiff was indicted for a Riot, and acquitted; and he brought an Action of the Case against the Defendant, for that such a Day, in such a Year, he did falsely and maliciously procure the Plaintiff to be indicted, &c. and had Judgment in the Common Pleas. And now a Writ of Error was brought to reverse the same.

It was insisted, That the Judgment was well given, and ought to be affirmed.

The Question is, Whether an Action will lie for causing another maliciously to be indicted of a Trespas?

2 Inst. 385.

It must be admitted, if the Indisment be not good, the Action will fail, because the Party is not *Legitimo modo acquiescens*.

But there is no such Objection here; for it is not pretended but that the Indisment was good both in Substance and Form.

Object. The most material Objection is, That a Man shall not be sued or vexed for prosecuting the King's Writ.

1 Salk. 14,
15.
1 Sid. 424.
N. B. 98. M.
Hob. 205,
206.
2 Inst. 544.
3 Cr. 378.
1 Sid. 463.
Yelv. 15.
Lutw. 122.
3 Ed. 319.
3 Aff. 1.
7 H. 4 31.
11 H. 7. 25,
26.
N. B. 106.
Stylk 379.
1 Lev. 292.
3 Lev. 210.
Skin. Rep. 131.

Ans. It is true, that it is lawful to prosecute such Writ; but though the Suit is legal, yet if it be for a Thing which is false, and known to be so even by the Plaintiff himself, an Action will lie against him for his unjust Accusation and Malice. And this was the Opinion of my Lord Hobart, in giving Judgment in the Case of Freeman and Waterer; it was an Action of the Case for a double Execution. Judgment was given for the Plaintiff, though he was not twice charged with the Damages; for the Goods levied by the first Execution remained in the Sheriff's Hands *pro defectu emptorum*, but he was maliciously vexed the second Time.

It is Malice that is the Foundation of all Actions of this Nature, which incites Men to make Use of Law for other Purposes than which it was ordained.

Earth. 113, 114.

Actions

Actions on the Case are frequently brought for suing without any Cause of Action; and it is never allow'd to say, that the Plaintiff hath a sufficient Recompence by Costs obtained by such Suits; for those are but Expense Lites; it is the unjust Trouble and Iteration which intitles him to the Action.

It lies for maliciously prosecuting one in the Ecclesiastical Court, and causing him to be excommunicated; in which Cause this very Objection was made, That a Man shall not be punished for prosecuting the King's Writ. And it was also objected, That an Action will lie for falsely indicting a Man for a Trespass: Yet the Court were of Opinion, That a Citation ex Officio prosecuted with Malice, was a sufficient Ground for the Action.

An Action of the Case, in the Nature of a Conspiracy, will lie against two for conspiring a false Indictment; and by the same Reason, an Action will lie where one alone causes another to be indicted falso & malitiose.

And this seems to be the ancient Law; for in Edw. III.'s Time, a Bill of Conspiracy was allowed in the Court to be brought by him who was indicted of a common Trespass, and acquitted.

Vide Resolution of the Court, post. 405.

Atkinson versus Cornish.

AN Infant was made Executor, and the Ordinary committed Administration to another Durante minore ætate; this doth cease at his Age of Seventeen. But if such Administration be granted Durante minore ætate of one who is not made an Executor, it doth not cease till the Party is of full Age. Pet Cur.

The Case of Pigot and Gascoigne was cited to maintain this Opinion; which was, Anthony Longvill made William his Executor, who was under Age; the Plaintiff took out Administration to Anthony, durante minore ætate of William, and brought an Action of Debt upon a Bond, and averred that William was alive, and within the Age of one and twenty. Now because it did not appear but this Administration was granted whilst he was under the Age of Seventeen, the Plaintiff was nonsuit.

1 Vent. 86.
Hocking ver.
Matthew.
Cro. Car. 291.
2 Inst. 552.
2 Cro. 193.
Cox ver.
Virral.
1 Rol. Abr.
112.
Placito 10.
3 Ass. Placito
10 13.
11 H. 7. 26.
Placito 7.
Fitz. N. B.
116.
Litt. fol. 2.
Reg. 134. b.
S. C. 1 Salk.
69.

Cro. Eliz. 602.
5 Rep. 29.
Prince's Case.
Comb. 475.
Fitzgib. 163.
1 Salk. 37.
1 Vent. 219.
Skin. Rep.
155, 156.
Carth. 446.

Cox versus Copping.

A Difference arising between the Plaintiff, who was Improprator, and the Parishioners, concerning the Right of a House, he brought an Ejectment, and by his Counsel moved the Court, That the Church-wardens, who had the Custody of the Parish-Books, might

might produce them, so that he might have a Sight thereof, and Copies of what concern'd his Title; and this was compar'd to the Cases of Corporations and Copyholders, who upon such Applications have frequently obtained Rules of this Court for the Steward to grant Copies, and that the Court-Rolls might be produced at Testis.

It was likewise said, That if the Plaintiff should exhibit a Bill against the Church-wardens, he would have an Account of the Parish-Books.

But the Court were of Opinion, That this Case differed from that of Copyholders, because all the Tenants of the Manor have an Interest in the Court-Rolls; but here the Impropriator hath a distinct Interest from the Parishioners, for it was not a parochial Right, but a Title which is now in Question. And therefore it was not Reason that the Parish-Books should be produced, which would be to shew the Defendant's Evidence.

Comb. 417.

Then as to Church-wardens, they are not a Corporation without the Parson.

Inhabitants of Battersea *versus* Westham.

Vide 2 Salk.
472, 494.
606. ante
208, 209.
post. 416.

TWO Justices made an Order to remove a poor Man from Westham to Battersea; the Parishioners of Battersea appealed to the Sessions, and the Order of the two Justices was set aside: Afterwards, but in the same Sessions, upon Allegation of Counsel, the Sessions did supersede their first Order, and confirm the Order of the two Justices; and upon a Motion made to this Court, it was alleged, That the Record was in the Breast of the Court during the whole Sessions, and therefore they might lawfully supersede their own Order. To which it was answered, That they having once exercised their Authority, they cannot set it up again. The Court affirmed the second Order of Sessions, and quashed the first.

Anonymous.

Comb. 42.
1 Salk. 339.
2 Salk. 567.
568, 598.
6 Mod. 374.
319.

NOTA: Per Cur. A writ of Error was brought in this Court, to reverse a common Recovery, and there was a Sci' Fac issued against all the Co-defendants, and they made Default. The Recovery was reversed, and it appearing afterwards, that the Plaintiff in the writ of Error had no Title, there being a Re-

mainder Man before him, the Court reversed their former Reversal. Quod Nota.

Anonymous.

AN original Order was made at the Sessions to this Effect: It appearing to this Court, that the Parish of Dimchurch, in the Hundred of Worth, being over-burdened with Poor, and that the Parish of Eastbridge, within the same Hundred of Worth, having no Poor relievable within their said Parish, 'tis ordered, That the said Parish of Eastbridge be from henceforth annexed to the said Parish of Dimchurch, and that the Occupiers of Lands and Tenements, within the said Parish of Eastbridge be chargeable and contributory towards the Relief of the Poor of the said Parish of Dimchurch the Sum of 20 l. per Annum by monthly Payments, so long as the said Parish shall be over-burdened, and no Poor within the said Parish of Eastbridge.

Vide ante
163, 209.
post. 415.

Comh. 242.
See 43 EL.
c. 2. §. 3.
Skin. Rep.
259.

A Motion was made to quash this Order, because it was in Nature of an Act of Parliament; but it was quashed, because it was an original Order: It should have begun with two Justices.

Firgib. 83,
84.

Anonymous.

TWO Justices made an Order, viz. Being informed that the Overseers of the Poor had refused to pay 1 s. a Week to a poor Man; they order, That the said Overseers shall continue to pay him the Arrears till they find him a House.

2 Salk. 473,
491.

It was objected against this Order, That the Overseers have not Power to find a House for him; that must be done by the Consent of the Lord of the Manor, or by the Justices in Sessions.

2. It did not appear that he was poor or impotent: And for these Reasons it was quashed.

Atwood versus Duell.

Vide 1 Salk.
89.
2 Salk. 603.

THERE was a Judgment in Sci' Fa' against the Bail: They brought a Writ of Error, as well upon the principal Judgment, as upon the Judgment in the Sci' Fa'; but it was quashed, because they were not Parties to the original Judgment.

iiii

Savage

Savage versus Robury.

S. C. 2 Salk.
694.
Vide 1 Vent.
117, 263.
Ray 62, 169.
Jon. 156.
2 Saind. 307.
1 Lev. 280.
Ca. in Law
and Equ. 111,
196, 197, 198.
Skin. Rep.
364.

THE Plaintiff was a Tradesman, who brought an Action against the Defendant for scandalous Words spoke of him, You are a Cheat, and I will prove you a Cheat for many Years. The Plaintiff had a Verdict, but the Judgment was arrested, because these were Words of Heat, and not actionable, having not alleged that the Cheat was in any thing concerning his Trade. Quod Nota.

Addington versus Oakley.

Ca. in Law
and Equ. 145,
185, 210,
230, 301.
Fitzgib. 174,
275.
Comb. 149,
150, 284,
426, 427.
1 Sid. 203.
Skin. Rep.
289.
Carth. 6, 86,
131, 189,
206, 272,
304, 389.

THE Plaintiff had a Verdict at the Assizes in Oxford, and a Motion was made to stay the Judgment till he brought in the Postea, for it did not appear to the Court on what Day the Assizes was held, for the Record of Nisi prius was, Nisi Justiciæ Domini Regis ad Assisas in Com' præd' capiend' assign', &c. die Jovis decimo sexto die Martii apud Oxon', &c. The Distringas for the Jury to appear was, Si prius die Jovis vicesimo sexto die Martii apud Oxon', &c. So was the Jurata.

The Counsel for the Defendant desired, That it might be referred to the Master of the Office to be examined; but the Court would not allow it, for it was to examine Matter of Fact against a Record: But they held, That the Defendant could not take Advantage of this after Judgment; for if the Clerk of the Assize will enter Judgment for the Plaintiff instead of the Defendant, he has no Remedy but by Action.

Carter versus Shephard.

Vide 6 Mod.
36.
2 Salk. 442.
3 Lev. 299.
3 Mod. 86.
Molloy Lib. 2.
Ch. 10.

THE Defendant was a Goldsmith, and the Plaintiff had a Note of 100 l. drawn upon him, which he brought to his Shop in order to receive the Money; at the same Time another Person came thither to pay the Goldsmith 80 l. which he desired the Plaintiff to tell in Part of his 100 l. Accordingly the Plaintiff told 50 l. thereof, and put it in his own Bag, and laid it upon the Counter, and whilst he was telling the rest, another Person (there being several in the Shop paying and receiving Money) stole away the Bag of 50 l. The Action was now brought against the Goldsmith for 100 l.

It was said, that this 50l. was not paid to the Plaintiff, for the whole Money must be in the Possession of the Goldsmith till all was told, for the telling is only in order for Payment; and as long as it is subject to be retold by the Goldsmith, it is not in the Receiver's Possession.

Now though the 50l. was put up in the Bag, yet if the 80l. had been told first, the Goldsmith would have retold the 50l.

Curia. Telling the Money, and resting satisfied when told, is sufficient to carry the Possession to the Receiver, and he, and not the Goldsmith, might have maintained an Action of Detinue for this Money in the Bag; but the Plaintiff had Judgment for 50l. & nil capiat per Billam as to the rest.

Dubartine *versus* Chancellor.

AN Action was brought against the Defendant, for lying with the Plaintiff's Wife: He pleaded in Abatement, and there being a Judgment to answer over, Issue was joined, and it was tried in the Country, and the Plaintiff had a Verdict.

It was moved to set aside this Judgment, because the Plea in Abatement was not entered on the Nisi prius Roll; the Plea Roll was right, but the Nisi prius Roll shall not be amended by that. And for this Reason the Court did set aside the Judgment.

Rex *versus* Mayor of Lincoln.

Will'us Tertius Dei gratia, &c. Majori & Vic. Civibus & Com. Civit. Lincoln. in Com. nostro Linc. salutem. Cum a tempore cujus contrar. memoria hominum non existit, talis consuetudo habit. fuit infra Civitat. præd. quod quælibet Persona qui inserviret tanquam Apprentitius infra Civitat. præd. in aliqua Arte five Mysterio cum aliquo libero Homine vel assign. suis liberis Hom. Civit. præd. per spatium

septem Annor. clamaret Libertatem & Privileg. fore admitt. in Locum & Officium un. liberor. Hom. Civit. præd. & in Libertatem præd. [Anglice Freedom] Civitat. præd. & secundum consuetud. Civit. illius gaudere & uti omnibus Liber. Priv. Pre-eminentiis & Commodit. lib. Hom. Civit. præd. spectan. & pertinen. cumque etiam quidam Abrahamus Morrice nuper inservit ut Apprentitius infra Civit. præd.

Carth. 506,
507.
Vide 1 Salk.
47, 48, 49,
53.
Ante 212.
Comb. 393.
3 Bull. 311,
Dyer 260.
1 Cro. 275,
278.

præd. per Spatium septem Annor. in Arte sive Myſterio Mercenii cum libero Homine Civitat. præd. & Assign. ſuis liberis Hominibus Civitat. prædict. ſecundum Conf. Civitat. prædict. & ſuper inde clamavit Libertatem & Privileg. fore admiſſ. per vos in Locum & Officium un. liberorum Hominum Civitat. præd. & in Libertatem [Anglice Freedom] Civitat. præd. admittere & ſeſe obtulit ad præſtand. Sacrum in eo Caſu requiſit per Solempn. Affirmat. ſive Declarat. ſecundum Actum in Parlamento tent. in Annis Regni Will. tertii, nunc Regis Angliæ, &c. ſeptimo & octavo fact. & edit. Diſt. Abrahamo ad tunc exiſten. un. de Diſſentien. [Commun. vocat. Quæſt. 11] Vos tamen Ma'or, &c. præſentor. non ignari prædict. Abraham. Morrice in præd. Locum & Officium un. liberorum Hominum & in Libertat. Civitat. prædict. non admiſiſt. nec præd. Abraham. Morrice per ſolempn. Affirm. ſive Declarat. ſecundum Actum prædict. in Loco Sacramenti in eo Caſu Uſitat. fore præſtand. ſecundum debitum Offic. veſtrum facere permiſiſt. ſed ita facere minus juſte recuſatiſt in poſt contemptum & ipſius Abrahami Dampnum non modicum & Gravamen & Status ſui Læſionem manifeſt. ſicut ex Quærela ſua accipiunt. Nos igitur præſat. Abrahamum Morrice, debitam & feſtivan. Juſtitiam in hac Parte fieri volentes, ut eſt juſtum, vobis & cuilibet veſtrum mandamus, firmiter injungen', quod imme-

diatè poſt Reception. huius Brevis prædict. Abrahamum Morrice in Loco & Officio un. liberor. Hominum & in Libertat. Civit. præd. admiſſitatis una cum omnibus Libertat. Privileg. Commo- dant. ad inde ſpectant. & eundem Abrahamum Morrice ſolempnem Affirmat. ſive Declarat. præd. in Loco Sacramenti in eo Caſu uſitat. facere permittat. vel Cauſam nobis ſignificetis in contrar. ne in veſtris deſectib. Quærela ad nos perveniret iteratim, &c.

The Return.

Executio iſtius Brevis patet in quadam Scheda huic Brevi annex. Georg. Brucebridge Major. Reſponſ. Major. Vic. Civium & Communitat. Civitat. Lincoln. de Brevis huic Schedule annex. ſecundum Exigentiam Brevis prædict. Domino Regi humillime certificantur quod Civitas Lincoln. prædict. non eſt in Com. Lincoln. ſed in Com. Civitat. Lincoln. & quod habetur, & a Tempore cujus Memoria Hominum non exiſtit talis Conſuetudo habita fuit infra Civitat. prædict. quod quælibet Perſona quæ inſervit tanquam Apprentice infra Civitat. præd. in aliqua Arte ſive Myſterio cum aliquo libero Homine, vel Assign. ſuis liberis Hominibus, Civit. præd. per ſpatium ſeptem Annor. poſtquam ſeſe obtulit in Commun. Conſilio Maj. Vic. Civ. & Communitat. Civitat. prædict. ad præſtand. & præſtavit Sacramentum in eo Caſu uſitatum in his Anglicanis Verbis ſequentibus:

Pou

You shall bear faithful Allegiance to our Sovereign Keige Lord, King (Regem tunc regnantes nominando) and to his Heirs, Kings of England; and be meet and justifiable to the Mayor of this City that now is, and his Successors that hereafter shall be, all that may be for the common Profit of this City you shall do, and all Liberties and franchises thereof you shall maintain. To your Power all Ordinances and Customs, made and to be made, you shall keep. You shall be leuant and couchant, to keep House of Chamber within this City, and all manner of Charges and Offices laid to you, for common Weal, Morshipp, or Profit of this City you shall bear, and be contributory to your Power. You shall have no Part of Merchandise with any Merchant-Stranger to sell or colour by any means, but you shall pay Toll for it. You shall colour none of Infranchis'd Men's Goods, whereby the Sherifalty or the Commonalty should lose their Right. You shall nothing do nor labour that shall be to the Presudice, Derogation, or Hindrance of the common Weal or Profit of this City; but all Points and Articles, and what else belongs to be done by a Freeman of this City, you shall keep and maintain to your Power: So help you God. Et non priusquam clamaret Libertat. & Privileg. fore admitt. in Locum

& Officium un. liber. Hominum Civitat. predict. & in Libertat. [Anglice Freedom] Civit. predict. secundum Cons. Civitat. illius & gaudere & uti omnibus Libertatibus, Privileg. Preeminenciis, & Commoditat. Libero hom. Civitat. predict. spectan. & pertinen. & post Prestation. Sacri predict. & non ante admitti debet per Commune Concilium Majoris Vic. Civium & Civitat. predict. in Locum & Officium un. liber. Hom. Civitat. predict. & in Liberi. [Angl. Freedom] Civ. predict. secundum Cons. Civit. ill. & gaudere & uti omnibus Libertatibus, Privileg. Preeminenciis & Commoditat. libero Homini Civit. predict. spect. & pertinen. Et ulterius certificamus, quod predict. Abrahamus Morrice nuper, videlicet, 10 Die Februarii, Anno Regni dicti Dom. Regis nunc octavo, inserviit ut Apprentitius infra Civitat. predict. per spacium septem Annor. in Arte sive Mysterio Mercerii cum libero Homine Civitat. predict. secundum Cons. Civitat. predict. & postea predict. decimo Die Febr. eodem Anno Regni dicti Dom. Regis nunc octavo, superinde ad Commune Consilium Majoris Vic. Civium & Communitat. Civit. predict. ad tunc infra Civitat. tent. clamaret ad Libertat. & Privileg. fore admitt. ad tunc & ibidem per Commune Consilium predict. in Locum & Officium un. liberorum Hominum Civitat. predict. & in Libertat. [Anglice the Freedom] Civitat. predict. Et ad tunc & ibidem sese obtulit loco usualis Formae Sacramenti predict. ad prestand.

præstand. suam solemnem Affirmat. sive Declarat. Verbor. Sacramenti præd. secundum Actum in Parlamento act. in Annis Regni Will. tertii nunc Regis Angliæ, &c. septimo & octavo. fact. & edit. intitulat. *An Act that the solemn Affirmation and Declaration of the People called Quakers, shall be accepted instead of an Oath in the usual Form.* Ipso Abrahamo adtunc & adhuc existens. un. de Dissent. Commun. vocat. Quakers, sed præd. Abrahamus adtunc & ibid. recusavit præstare Sacramentum præd. in usual. Form. præd. secundum Conf. Civitat. prædict. Et ulterius dicto Domino Regi certificamus, Quod Officium & Locus liberi hominis consistat. præd. est Officium & Locus Communi in Gubernation. in Ann præd. mentionat. Et quod infra Civitat. præd. habetur, & de Tempore cujus contrarium Memoria hominum non existit. talis habebatur Consuetudo, quod quilibet liber Homo Civit. præd. Vocem haberet in eligendo duos Cives ad servien. pro Civitat. præd. in Parliament. hujus Regni quandocunque Rex Parlamen-

tum suntu teneri ordinaverit, & quod quilibet liber Homo Civit. præd. habeat communem Pastur. in vastis jacent. infra Civitat. præd. pro tribus Equis, vel pro tribus Vactis, vel pro tribus Juvenis suis, omni Tempore Anni. Et ulterius dicto Domino Regi certificamus quod præd. Abrahamus Morrice nunquam sese obtulit in Communi Consilio Majoris Vic. Civ. & Communitat. Civitat. præd. præstare nec unquam præstavit Sacramentum præd. in usuali Forma præd. & ex his Causis præd. prædict. Major Vic. Civ. & Com. Civit. præd. prædict. Abrahamum Morrice in præd. Locum & Officium un. liberorum hominum, & in Libertat. præd. non admiser. nec præd. Abrahamum Morrice per solemnem Affirmation. sive Declaration. secundum Actum præd. in Loco Sacramenti in eo Casu usitat. fore præstand. facere permiser. sed ita facere præd. decimo Die Februarii, in præd. octavo Anno Regni dicti Domini Regis nunc recusaver.

George Bracebridge, Mayor.

Rex versus Mayor of Lincoln.

1 Lev. 91.
1 Sid. 107.
Vide 2 Jon.
52.
3 Mod. 333.
1 Sid. 29, 71.

THIS was a Mandamus to the Mayor, &c. of Lincoln, to admit one Abraham Morrice to his Freedom, he having served an Apprenticeship there.

He was a Quaker, and the late Statute enacts, That every Quaker, &c. who shall be required upon any lawful Occasion to take an Oath, where by Law an Oath is required, shall, instead of the usual Form, be permitted to make his solemn Affirmation or Declaration,

claration, &c. Then there is a Proviso, That no Quaker or reputed Quaker shall, by Virtue of that Act, be qualified to give Evidence in any criminal Cause, to serve on any Jury, or bear any Office or Place of Profit in the Government.

Stat. 7 & 8
W. 3. c. 34.

The Mayor hath returned, That the City of Lincoln is an ancient City, and alleges a Custom, Time out of Mind, for every Person who hath served an Apprenticeship there, to offer himself to the Mayor and Common-Council to take the usual Oath (which is set forth in hæc verba) before he shall be admitted to his Freedom. That the said Morice had served an Apprenticeship there to a Mercer; and thereupon he claimed his Freedom of the said City; and offered to take the solemn Affirmation and Declaration: That he was a Dissenter called a Quaker, and refused to take the usual Oath according to the Custom of the said City: That to be a Freeman thereof, is a Place of Profit in the Government: And that there is a Custom there, for every Freeman to vote in the Election of two Citizens to serve in Parliament for the said City, and to have Pasture for three Horses in the Common, &c. That the said Morice never offered himself in Common-Council to take the said Oath in usual Form; and for that Reason they did not admit him to his Freedom upon his solemn Affirmation and Declaration, &c. which they would not suffer him to take.

Vide ante 316,
317.
post. 413,
432.

The Question was, Whether the Freedom of this City was a Place of Profit in the Government?

And it was argued, That it was not; 'tis only a Qualification or a Privilege to agree or consent to the Person who shall be his Representative in Parliament.

On the other Side it was said, That the Design of the Act is to give Ease to the Quakers who scruple to take an Oath, and to relieve them from Penalties and Punishments for refusing to swear where by Law an Oath is required.

That an Oath is not required here, so as to subject a Person to a Penalty for the Refusal, because he who bears an Oath is not obliged to take an Oath but for his own Benefit; and he incurs no Penalty to refuse it, but only acquits himself of the Oath.

This is either a publick or a private Place in the Government; 'tis publick as it intitles him to vote for Representatives in Parliament, or private as to be a Magistrate in that particular Place where he hath obtained a Freedom.

Curia. This Person hath a precedent Right to have his Freedom: The Quakers are usually admitted in London upon their solemn Affirmation; and so he was in this Case.

Carthew 448.
S. C.

Rex

Rex versus Blythe.

Vide 4 Mod.
106, &c. 122,
&c. 236, 238.
post. 452,
453.

BY the local Statutes of Clare-Hall in the University of Cambridge, 'tis provided, That the Person in quem Magister & major pars Sociorum convenerit pro Socio habeatur.

It happened that Mr. Jennings was chose by eight of the Fellows, and another was chose by six; and the Master of the Hall, Dr. Blythe, gave his Vote with the six.

Mr. Jennings supposing himself to be duly elected Fellow, brought his Mandamus to be admitted, having been refused by the Master, &c. because it was insisted that his Concurrence was necessary; for by the Statutes of the Founder, he must be One, and that without him a Fellow could not be elected: The Words are, In quam Magister & major pars Sociorum convenerit.

There was a Clause, That if any Doubt should arise about the Exposition of these Statutes, it should be determined by the Visitor.

It was argued, That the Visitor had only a Power to displace upon Misdeemeanors, he was appointed to a special Purpose, Quoad Punitonem, and that the Master had only Authority to correct for Misdeemeanors.

Relv. 67.
1 Cro. 60.
Comber. 266,
267, 268.
Ekin. Rep. 13,
454, 468, 483,
491, 495, 513.
Carthew 93.

Curia. It was never yet determined what Power the Visitor hath: In Dr. Patrick's Case the Question was, Who was Visitor? And the Court was divided.

All eleemosynary Corporations who are to receive the Charity of the Founder, have Visitors, if they are ecclesiastical Corporations; and if a particular Visitor is not provided by the Founder, then the Ordinary of the Place is Visitor; if they are Lay-Corporations, the Founder and his Heirs are perpetual Visitors.

4 Mod. 368.
post. 452,
453.

Rokeby, Justice, was of Opinion, That a Fellowship was such an Interest, for which a Mandamus ought to be granted; and it would appear upon the Return, whether the Party had such an Interest or not.

The Court were also of Opinion, That the Master had only a negative Vote in this Case.

Calvery *versus* Leving.

Covenant for not repairing a house in Chester, the Action was brought in Chester generally: after Issue joined, quod reparavit, there was a Mandate to the Chief Justice of Chester, to award a Venire, quia exitis præd inter partes præd superius junct per ho'ies Com' Palatini Cestrie, videlicet, de vicinet. de Tavin præd in Com' Cestrie præd ubi Breve Dom' Regis non currit & alibi trari debet, ideo record loquela præd Mand' Justiciar' ipsius Domini Regis præd Com' Cestrie ita quod idem Justiciar' dict' Domini Regis Com' Cestrie præd, &c.

There was a Merida for the Plaintiff, and 40s. Damages, and it was moved in Arden de Judgment, that this was a writ-crill, for the Issue was Local, i. e. within Chester generally, and the Trial was in the County of Chester at large. So it was not of a Jury of the County in Place where the Action was laid, but by a Jury of the wrong County, which is not allowed by the Statute, but only a wrong Venue in a proper County: As if the Issue ariseth at Illington in Middlesex, and the Venue is of Hampstead in the same County, the County is right, but the Venue is otherwise.

So it was in the Case of Cotton and Johnson, Hill. 1 Will. an Ejectment was brought for Lands in the County of Ely, and the Cause was tried in Cambridghire, it was held good, because Ely was Part of the County: But in this Case there are distinct Counties.

The Statute must not be construed, that the Cause shall be tried where the Action is laid, but in the County where the Issue doth arise, which was in Chester; but this Cause was not tried there.

Curia. Trials have been set aside lately for this Reason.

Roberts *versus* Savill.

S. C. ante
394.

Resolutio Curie.

Holt, C. J. **T**HIS Case comes before us on a writ of Error brought upon a Judgment given in the Common Pleas, in an Action on the Case, wherein the Plaintiff declared, That the Defendant did falsely and maliciously, &c. cause him to be indicted at the Sessions for a Riot, upon which he appeared,

Vide 2 Mod.
306.
6 Mod. 30,
90, 137, 185,
169.
Carth. 416,
S. C.

L 1111

peared, and was acquitted; and also, that the Defendant did falsely and maliciously cause him to be indicted another Time at the Sessions for a Riot, to which Indictment he appeared, pleaded, and was acquitted; by Reason of which Prosecutions he lost his good Name, and was at great Trouble and Expences, &c. to his Damage 100l. To this Declaration the Defendant pleads Not guilty, and Issue being joined and tried, the Jury gave a Verdict for the Plaintiff, and 11 l. Damages.

The Defendant moves in the Common Bench for Arrest of Judgment, and the Question there was, Whether the Action lay? And upon Debate there, the Court was of Opinion, that the Action did lie: And the same Question having been debated and argued here, we are also of the same Opinion, that the Action does lie.

This is no new Point, it has been often controverted here, though I think there are full Authorities to maintain this Action.

And for the better settling the Matter, it may be fit to consider, upon what Grounds these Actions are maintained; and I take it, that there are three Sorts of Damages which will support all Actions of this Nature.

First, Where a Man is injured in his Fame or Reputation, so that his Good-Name is lost, by Reason of which Injury, if the Words themselves do not bear an Action, the Loss or Damage that may ensue, will. Yelv. 46. Barns and Constantine, the Action there was for indicting the Plaintiff before such Justices, Ad diversas Felonias necnon ad pacem conservand' assignat' as a common Barretor, and Non culp' pleaded, and that he was lawfully acquitted. The Defendant demands Oyer of the Indictment, and it was certified to be taken before such Justices Ad pacem conservandam only; and yet it was held, that the Action lies. And that this Action is but for Damages for Slander, which well lies, although the Indictment be Erroneous; or as it had been adjudged if a Bill be offered, and Ignoramus found. Cro. 2. 32. Same Case.

Raym. 180. for malicious indicting the Plaintiff, being a Justice of Peace, for delivering a Tagrant out of Custody without Examination. Per Cur': Where a Man prefers an Indictment maliciously, and such Indictment contains Matter of Imputation and Scandal, as well as Crime, there the Action will lie. Aliter where the Indictment contains Crime without Scandal, as on forcible Entry; here is Slander as well as Crime. Judgment pro Quer. Sir Andrew Henly and Dr. Brunsthall.

The

Ca. in Law
and Equ. 145,
148, 149,
210, 217,
219.
Carth. 416.

Three Sorts
of Damages
which will
support Ac-
tions of this
Nature.

1 Salk. 13,
14.
1 Vent. 86.
Ante, 395.
1 Sid. 424,
463.
N. Br. 98. M.
106.
2 Inst. 544.
3 Cro. 378.
Yelv. 15.
Lutw. 122.
3 Ed. 3. 19.
3 Ass. 1.
7 H. 4. 31.
11 H. 7.
25, 26.
Styl. 379.
1 Lev. 292.
3 Lev. 210.
Skin. Rep.
131.
Carth. 113,
114.

The Second relates to a Man's Person, where he is assaulted or beaten, or put under any Confinement whereby he is deprived of his Liberty; as appears by the Statute 3 Edw. 3. 33. But my Lord Coke, in 2 Inst. 566. says truly, That that Statute was made in another Year, viz. 3 Edw. 3. 19.

But neither of these Sorts of Damages are the Foundation of this Case, for here his Reputation or Person are not damaged.

Now there is a third Sort of Damages, which a Man may sustain in Respect of his Property; and this is the Ground of the present Action, for that the Plaintiff was put to unnecessary Charges to answer this Indictment; and it is most plain, that he was put to unnecessary Expences, for that the Jury have found this Prosecution was false and malicious.

Now if there be an Injury done to a Man's Property occasioned by a wicked and malicious Prosecution, it is all the Reason in the World that a Man should have an Action to repair himself. And so it appears in 3 Ed. 3. 19. which is express. 3 Aff. Pl. 13. 7 Hen. 4. 31. 11 Hen. 7. 25, 26. One was indicted by two Defendants in another County than where he was Demurrant, Secundum Stat. 8 Hen. 6. c. 10. though it be Conspiraverunt, yet one shall plead without the other, for the Tort is several; and many other Books.

It has been objected against these old Cases, that these Actions were grounded upon a Conspiracy, which is odious in the Law, and that to discourage such Conspiracies to ruin Men, such Actions were allowed.

But I answer, that in those Cases the Conspiracy was not the Ground of the Action, but the Damage which the Plaintiff sustained in respect of the needless Expences he was put to; for no Action lies for the bare Conspiracy, but it is the malicious Prosecution which is the Ground of the Action: And when one only doth falsely and maliciously carry on the Prosecution, yet an Action lies; and though it is called an Action of Conspiracy, yet truly it is only an Action on the Case. Jo. 93. F. N. B. 110, 116. And it is only properly an Action of Conspiracy where the Indictment is for Treason or Felony. 2 Inst. 562.

Actions for
Conspiracy.
Vide 1 Silk.
174.
Ames, 223,
224, 394.

And

And therefore if such an Action be brought against two, and one only is found guilty, no Judgment can be given, for this is properly a Conspiracy, it being to indict a Man for so criminal a Matter.

Action of Conspiracy against two, and one is only found guilty.

1 Salk. 13, 14.

15, 21.

Ante 223,

224.

1 Saund. 229,

230.

1 Vent. 12,

18, 25.

Raym. 135,

176, 180.

2 Salk. 456.

2 Mod. 306.

6 Mod. 261,

&c.

But where the Conspiracy is only to indict a Man for a Mis-
behaviour, though the Action be against two, and only one is
found guilty, yet Judgment shall be against him as in the Case
of Trespass; for really it is an Action on the Case, and no Ac-
tion of Conspiracy.

There has been another Objection, and that is, the Opinion
of the Judges in the Case of Sir Andrew Henley and Dr. Burnst-
hall, Raym. 180. and Low. cont. Beardmore, Raym. 135.

But though I have a great Respect for the Authority of Judg-
es, who at that Time sat here, yet I think it ought not to have
so much Weight, for that the Judges only spoke it Obiter, it
not being material to the main Point; and when a Bill of In-
dignity is not found, there is no Damage done. There is a
great deal of Difference between bringing an Action maliciously,
and prosecuting an Indictment maliciously.

In an Action, a Man either claims some Title, or com-
plains of an Injury; and therefore if a Man only thinks so,
the Law allows him all just Remedy. 4 Rep. 16. But then
if the Plaintiff's Demands are unjust, he is to be punished
by Way of Amercement, pro falso clamore suo; and besides, no
Man is to prosecute an Action without finding of Pledges; and
where an Action was heretofore, the Plaintiff was amerced pro-
portionably.

The Reason
of finding
Pledges, and
of being
amerced.

But indeed, this Remedy being but formal, the Act of Par-
liament gave the Defendant Costs: However, the ancient Form
of finding Pledges, and being amerced, is still retained; and
though it is true it is nothing but Form, yet the Principle of
Law which makes the Difference is still the same.

And besides the Costs, if it appear that an Action is brought
merely through Malice and Exaction, a good Action lies upon
showing forth this special Matter. So where one Man arrests
another

another for a great Sum of Money, when but a small one is due; Ca. in Law and Equ. 145, 209. or where a Stranger, who is not concerned, brings an Action; In either of these Cases a good Action lies. 21 Car. 2. Mich. 1 Sid. 424. Daw and Swain. In Case the Plaintiff declares, That the Defendant having arrested the Plaintiff in Middlesex, and intending to detain him in Gaol, falso & malitiose told the Sheriff, That the Plaintiff owed him 5000 l. and that he ought to take Bail accordingly, and that he was kept in Prison several Days. Verdict pro Quer. Per Cur'. The Plaintiff had Judgment given because he had special Damage by such Perilance, 1 Saund. 228. Action on the Case in Nature of a Conspiracy against three, one is found guilty, and the other two not guilty: Per Cur. It is good against him that is found guilty. This Action was brought to the Intent to keep him in Prison for Default of Warrancaptors for 300 l. ubi revera there was no Cause of Action. Gunston's Case, Raym. 135. and 1 Sid. 1659. Chamberlain and Prescot's Case, was for malicious Indisment on Stat. 8 El. c. 2. for procuring the Defendant to be arrested in another Man's Name, the Action lies; yet it is said there, this Judgment was reversed in the Exchequer-Chamber. And this Matter was mightily controverted, and it's true the Judgment in that Case was reversed, but it was not because the Action would not lie, but because he was not indicted of any Offence within the Statute, as appeared upon the Fact as it was set forth in the Indisment: So that if he had been convicted, he could have incurred no Damage; for the Court would have arrested Judgment. 1 Cro. 291. Carlion and Mill's Case was, That the Defendant, being Apparitor under the Bishop of Exeter, maliciously, and without Colour or Cause of Suspicion of Incontinency, of his own proper Malice procured the Plaintiff (ex Officio) to be cited to the Consistory-Court, &c. and there to be at great Charges and vexation 'till he was cleared by Sentence, which was to his Discredit and great Expences. It was moved, That the Action lay not for this; for he did not cite him but as an Informer, and by Virtue of his Office: But per Cur', the Action lay; for it is alledged, that he falso & malitiose caused him to be cited upon Pretence of Fame, when no such Offence was committed, and avers, That there was not any such Fame, so as he did it maliciously and of his own Head. 1 Roll. Abr. 112. Action on the Case against Church-wardens, for that they falso, &c. to the Intent to draw the Plaintiff within the ecclesiastical Censures for Adultery with A. S. and the Declaration was, That they conspired to do it, and the one was found guilty, and the other not guilty; yet this being but an Action on the Case, it lies. Dament and Rudock.

M m m m m

If

Procurement
of one to be
arrested in an-
other Man's
Name.

Vide 1 Salk.
14, 15.
6 Mod. 137.

If A. cause B. to be indicted for a common Barretor, upon which Indictment B. is acquitted, he may have his Action against A. Ibid.

But I must tell you, That this Action ought to be handled with a great deal of Caution after the Grand Jury have found the Bill upon their Oaths. But indeed, unless the Bill be found, no Action will lie, for that the Party is not damaged; neither is it a good Ground of Action or Indictment against a Man, that he barely procured him to be falsely indicted; but there must be express Malice found, that it may appear that the Prosecution was not for the Sake of Justice, but to gratify the Party's peevish Revenge or Malice.

So that upon the whole we all agree, That the Judgment must be affirmed.

D E

D E

Term. Sancti Mich.

Anno 10 W. 3. in B. R. 1698.

Harris *versus* Cage & Ux.

THIS is an Action on the Case, wherein the Plaintiff declares, That in Consideration the Plaintiff would marry the Defendant, the Defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other Defendant.

With Submission, this Action does not lie: Indeed it might be otherwise in the Case of a Woman; for a Marriage is an Advancement to a Woman, but not to a Man; as appears in Anne Davis's Case, 4 Rep. and in the Case of a Feoffment causa Matrimonii prælocuti. Which shews, there is a great Difference between the two Cases of a Man and a Woman; for it is a Breach of a Woman's Modesty to promise a Man to marry him, but it is not for a Man to promise a Woman to marry her. Then here is no Time laid when this Marriage was to be—And it may be still.

Then the Consideration is ill, 'tis no more than, I'll be your Husband, if you'll be my Wife: 'Tis no more than this, I'll be your Master, and you shall be my Servant. Carter 220.

Then it is not reasonable that a young Woman should be caught into a Promise.

Econtra.

With Submission, the Action very well lies, and certainly Marriage is as much Advancement to a Man, as it is to a Woman. And I am sorry that the Counsel of the other Side has so mean an Opinion of a good Woman, as to think she is no Advancement to

S. C. 1 Salk.
24, 25.
Consideration
of Marriage.
Mutual Pro-
mise of Mar-
riage.
Vide 6 Mod.
156, 172.
3 Lev. 65.
2 Salk. 437.
438, 553.
Carth. 99,
100.

to a Man. We say we have offered ourselves, and she did refuse us; and though we do not mention the Portion, it is well enough.

Vide Nelf.
Lutw. 68, 78,
79.
1 Salk. 24,
25, &c. ante.

Ch. Just. Why should not a Woman be bound by her Promise as well as a Man be bound by his? Either all is a Nudum Pactum, or else the one Promise is as good as the other, and you agree a Woman shall have an Action. Now what is the Consideration of a Man's Promise? Why, 'tis the Woman's; then why should not his Promise be a good Consideration for her Promise, as well as her Promise is a good Consideration for his? There's the same Parity of Reason in the one Case as well as in the other, and the Consideration is mutual: As for the Case of the Matrimonii prælocuti, that goes upon another Reason, there being a Feoffment of Lands, and a Condition annexed to it; but this here is upon a Contract.

Ch. Just. In the Ecclesiastical Court he might have compelled a Performance of this Promise; but here indeed he has disabled himself, for he has married another.

Then you might have given in Evidence any lawful Impediment upon this Action; as that the Parties were within the Levitical Degrees, &c. for this makes the Promise void; but it is otherwise of a Pre-contract.

Turton, Just. There is as much Reason for the one as for the other; and Halcomb's Case in Vaughan is plain.

Rokeby, Just. If a Man is scandalized by Words, per quod Matrimonium omisit, a good Action lies, and why not in this Case? 1 Rol. Rep. 79. 2 Rol. 18. b.

Turton, Just. This Action is grounded on mutual Promises.

Ch. Just. The Man is bound in Respect of her Promise; if she makes none, he is not bound by his Promise, and then it is a Nudum Pactum: So that her Promise must be good to make his signify any thing to her; and then if her Promise be good, why should not a good Action lie upon it?

Subsequent Pro Quer?

Odes

Odes *versus* Clark.

Sir B. Shower. **T**HIS is an Action of Escape brought against the Sheriff, in which the Plaintiff declares, That the Defendant did arrest J. S. by Virtue of a Latitat, but saith not out of what Court, and afterwards suffered him to escape: And now the Sheriff moves in Arrest of Judgment, and pretends, that the Process is not well set forth in the Declaration. But the Sheriff cannot take Advantage of erroneous Process.

Escape.
Vide Ante 8,
202.
Post. 415.
1 Salk. 272,
273.

Here is sufficient in the Declaration to charge the Sheriff, and to shew he has been guilty of a Breach of his Duty; and if we have alledged sufficient Authority for the Sheriff to take him, it is well enough.

Econtra. The Exception to the Declaration is, That it cannot appear to your Lordship upon this Record out of what Court this Writ issued. It is only said, that the Plaintiff arrested J. S. Virtute cujusdam Brevis de Latitat in general, without saying, it issued out of this Court; and they have Latitats in one Sense in the Common Pleas, that is, they have Writs in which the Word Latitat is used.

Now though a Sheriff shall not take Advantage of erroneous Process, yet he shall take Advantage of void Writs; and this is a void Writ, for that it does not appear out of what Court this Writ issues; and if a Writ issues out of the Common Pleas, and made returnable here, it is void.

Sheriff not to
take Advan-
tage of erro-
neous Process.

Upon Reading the Declaration, the Words appeared to be, Quoddam Breve de Latitat de Curiis Dom. Reg. apud Westmonasterium, without saying out of which Court it issued.

Rokeby. A Latitat goes out of no Court but this.

Turton, Justice. Every one imagines a Latitat to go out of this Court.

Counsel. Then it is Breve de Latitat, and there is no such Thing in Nature as a de Latitat. It should be, Quoddam Breve vocat. Latitat.

N n n n n

Object.

Object. Whether prosecut. suit in Curia Dom. Regis will not imply this Court.

Resp. They are all the King's Courts, and here it is always said, Coram ipso Rege.

Chief Justice. Suppose he had said only Latitat in general, and had not said, Cur. Dom. Regis, would not that be well enough?

Let it stay.

S. C. 1 Salk.
272.

Rex versus Fells.

Indictment for
Escape.

Sir B. Shower. **W**E move upon two several Indictments of Fells the Keeper of Newgate, for suffering Berkenhead and Rayes to escape out of Gaol, &c. Upon which Indictments, Fells has been found guilty.

And now we move in Arrest of Judgment:

Vide 1 Sid.
208, 209,
439.
Ante, 137.
No Indictment
to be taken by
Intendment.

First, Upon Berkenhead's Indictment; for that it is not said, that he was in Custody of Fells as the Keeper of Newgate; so that he might be in his Keeping lawfully, or out of the Gaol, and perhaps he never was within the Gaol of Newgate, and then the letting him escape is no Crime; and to say that Fells did negligently permit him to escape out of the Gaol where he was not said to be, will not do. And no Indictment shall be taken by Intendment, the Facts must be certainly alledged, that we may know what to answer to.

6 Mod. 72,
86, 281.
Ante 202,
413.
Comber. 114,
295.

Then it is not said, that Berkenhead was in his Custody lawfully, or that he was to be there until he were discharged by Law; and to oblige a Gaoler to keep him, there must be a legal Commitment, and there ought to appear a lawful Warrant to charge him; and therefore if he did not come there by a lawful Warrant, the Gaoler is not bound to keep him until he be discharged by Law: And perhaps this Berkenhead might be only committed until the next Sessions, or till Examination by a Secretary of State, &c. And it is only said, that he was there charged for High Treason, which might be only by Fame or hearsay.

Now

Now as to Rayes's Indictment: It is said, That he was committed in Execution to the Gaoler; which is ill, for it ought to be expressed, that he was committed to the Custody of the Sheriff, who is the proper Officer: And why should Fells be any more subject to be answerable for these Escapes than any private Turnkey or Watcher?

Comber. 97,
96, 435, 436.

Then it ought not to have been, that Fells permitted him to escape without Satisfaction made to the Plaintiff, or Performance of the Judgment, &c. for it is the Sheriff who is to see the Punishment insisted, or Satisfaction made. It is not in the Gaoler's Power to perform the Judgment.

Northey. These Indictments are very extraordinary in the Frame of them: Certainly these Indictments, if turned, would not make a good Declaration. Sir, the Word Onerabilis is not good, they must shew how he was committed, for that Onerat. is uncertain; and though it is said, he was Onerat. with High Treason, yet it is not said, that when he escaped he remained sic onerat, as all the Precedents are in Actions of Escape.

Rokeby, Justice. There is certainly a Difference between Actions of Escape and Indictments.

Attorn. Gen. The Gaoler is an Officer of whom the Law takes Notice, and he is answerable for Escapes as well as the Sheriff.

As for the Objection, That it is not said that Berkenhead remained charged with High Treason at the Time of his Escape; if the Fact was so, then Fells might have taken Advantage of it at his Trial, and he would have been acquitted.

So a general Allegation, that the Judgment was not satisfied, is well enough. If it was satisfied, it ought to have been shewed on their Side.

Then the Indictment is express, That Berkenhead was in Fells' Custody in Newgate as Gaoler, and not there in Custody of him as a private Person. 1 Salt. 272.

The greatest Exception is, That it is only said generally, he was onerat, and does not shew particularly how; and perhaps in Actions of Escape the Precedents may be so particular, because the Party must shew how he is intitled more than any other Person, and to ascertain the Damage, must distinguish the Person; but here the King is a Sovereign, and Trustee for the Publick, and he need not distinguish himself, or shew how he is charged.

Holt,

Holt, Ch. Ju. The Charge upon him was Gaoler of Newgate, and you do not say, Berkenhead was in Newgate.

Then you say, he was charged for High Treason; now that might be, and yet he might not be committed for High Treason. Suppose he has been in Custody for Debt or Felony, now he may be charged with High Treason by another Person, and yet all this while he was not committed for High Treason.

And in Judgments by suffering Persons to escape, it must appear that the Party was lawfully committed.

2 Vent. 169,
170.

Judgment for suffering two Persons to escape, qui commissi fuer. by the Justices of Peace for Offences against the Statute of Forcible Entry. Error, because it is not set out how the Commitment was, whether upon the Oath of the Justices, or Verdict on the Indictment; and so it appears not whether he was legally committed. Per Cur. It being but Inducement to the Offence, and after Verdict, shall be intended the Commitment was legal. The King against Wright.

But, without doubt, Gaolers are chargeable for Escapes.

Indeed, if the Gaoler be insufficient, the Sheriff is answerable. Adjourn.

3. C. 2 Salk.
524, bis. &
525.

Order of Sessions for removal of a poor Fellow. Vide Ante, 163, 209, Blackerby's Cases 188, 189, 190, &c.

The Parishes of Ricelip and Henden.

IT was moved to quash an Order of Sessions, which was made for the Removal of a poor Fellow from Ricelip to Henden.

They set forth an Order of the Justices of Peace, by which he was removed first of all from Harrow to Henden; and upon Appeal to the Sessions, he was sent back again to Harrow. Then Harrow sends him to Ricelip, who appeal, and the Order is affirmed. Then Ricelip sends him to Henden, and Henden appeals, and that Appeal disallowed, and upon this Appeal he was settled at Ricelip.

Now the Order by which he was sent from Ricelip to Henden, is not good. The Statute of Car. 2. cap. 22. gives an Authority to send poor Persons to the Place of their last legal Settlement; and therefore the Justices, at these Sessions, having once settled this Person at Ricelip, and so extended their Authority, he is not to be removed again.

Mr. B. Shower. I hope this Order shall be quashed, for it is at Henden that he was legally settled, where he had 41. per Ann. Freehold: he was never legally settled at Ricelip.

We say, that Ricelip is not concluded, for that we were never before heard; for an Appeal is only final, and conclude between the Parties; but shall a Combination between two Parishes conclude another Parish, because Henden hath prevailed against Harrow, by Consent perhaps? That shall not conclude Ricelip, which is a third Parish, and a Stranger to the Appeal between Henden and Harrow.

Vide 2 Salk.
492, 524,
527, 606.
6 Mod. 269,
287.

Econtra. If Ricelip could have shewn, That he had a legal Settlement elsewhere, it would be something.

Sir B. Shower. Our Case is this: Ricelip removes him to Henden, then Henden appeals, and that Appeal is disallowed; but it appearing upon the Face of the Order, that he was legally settled at Henden, that Order ought not to have been likewise quashed.

Econtra. The first Order was from Harrow to Ricelip, and that Order was adjudged good upon an Appeal by Harrow; then Ricelip sends him to Henden, which we say they cannot do, for that they were concluded.

Vide 6 Mod.
287.
2 Mod. 72.
10 Co. 101.

Ch. J. Where the Justices of Peace to give a special Reason for their Settlement, and their Conclusion which they make in Point of Law will not warrant the Premises, there we will reverse their Judgment; but if they had given no Reason at all, then we would not have ravelled into the Fact.

But here at Henden it appears, That he had a Freehold which descended to him. Now if this Man may go and live there forty Days, shall he be disturbed? No certainly. And tho' they do adjudge this not to be a Settlement, yet we determine it otherwise according to Law.

But it was said, here the Justices have adjudged the Matter upon an Appeal between Ricelip and Henden, and this is conclusive.

Turton, J. No, since it appears that this Order was good upon the special Matter.

Shower. This Matter comes here upon the whole for the Opinion of the Court.

O o o o o

Ch. J.

Ch. J. But suppose he had sold his Estate at Henden, why then his Settlement ceased there, and perhaps he might have acquired another elsewhere, and therefore Ricelip may well be concluded; for that this might be the Place of his last legal Settlement, and then this Parish must maintain him till they find out another Parish where he was last legally settled.

The Question here is, What was the last Place he was legally settled?

Turton, J. If it appears that they have adjudged a legal Settlement which is not so, we may quash that Order, where the special Matter appears upon the Order.

Ch. J. That's true.

Rokeby, J. I thought this Difference had only been, whether the Bonding had been a legal Settlement, or his having a Freehold, the one being at Ricelip, and the other at Henden; and if so, I should be of Opinion, that the Settlement is at Henden.

Turton, J. Here seems to be Res inter alios acta, &c. for Ricelip and Henden were not concerned before.

Ch. J. But Ricelip was no third Person, for Ricelip was concerned.

Turton, J. It plainly appears now, that Henden is the Place where he was legally settled; and why shall not Ricelip send him thither?

Ch. J. This Fellow shall at this rate be sent up and down from Parish to Parish, and so make a Beggar by the Justice of the Peace's Order. Indeed, the Meaning here was, to have the Judgment of the Court upon the whole where this Man was legally settled, and the Design of this Order was to lay all Matters before us.

Shower. We say, That this Man was not settled at Ricelip, for that he had a Freehold at Henden.

Ch. J. But the Adjudication of the Justices of the Peace was, That he was settled at Ricelip, and we cannot falsify their
Judg-

Indignant; tho' it be illegal we cannot torret them in fact, of which they are sole Judges.

N. Obj. Two Justices of Peace cannot send a Man over to any other Place than his last legal Settlement before an Appeal: And why should they have Power to send him over after an Appeal?

Ch. J. Let a Man be settled where he will, we are all of Opinion, that a Man may go and live where he has an Estate, and therefore he might have gone to the Place where he has a Freehold. Adjournatur.

2 Salk. 524.
536.

The King versus Pope.

Mompesson moved, to quash an Order made by the Justices of Peace at their Sessions for Servants Wages, and Costs of Suit. They have committed him to Prison for not performing it, which they cannot do, they ought to have indicted him for disobeying their Order. Then the Justices of Peace have no Power to compel the Payment of Servants Wages.

Order by Justices to compel Payment of Servants Wages.
Vide 2 Salk. 442, 477, 484.
Cases in Law and Equity 68.
Comber. 63.
213, 325.
Carthew 156.

Ch. J. Let it be quashed, Nisi.

Alinson versus Spence.

Counsel moved, to quash an Order that was made for the maintaining of a Bastard-Child when it was born in lawful Wedlock; for it's said, That the Husband was at Cadiz.

Maintenance of a Bastard-Child born in Wedlock.
Vide 1 Salk. 272.

Then here is a Sum in Costs ordered, which is fit; besides, we say it is a Contumace.

2 Salk. 434.

Sir B. Shower. None can be a Bastard within the Statute, but those who are Bastards within the Statute of Stillborn-Children, 21 Jac. 1. c. 27. And no one will say this Child was within that Statute.

I grant this Child could not inherit the Husband's Estate, but that goes upon the particular Rules of Descents; but this Child is within the Statute of 43 Elin. and the Father should have maintained it.

I have

I have another fatal Exception to this Order; it is said, That he was not there when the Child was begot or born; in the Disjunctive, which is ill; for he might be there at one of those Times, and be might be absent the whole Space of Time, both when the Child was begot, and when it was born.

Ch. J. Suppose a real Action had been brought by this Child, and Bastardy pleaded; must not the Bishop have certified, that he was a Bastard?

Indeed, where a Man is a Mulier, there must be a special Bastardy certified, for that the Bishop does such a one to be legitimate.

But here the Father being beyond Sea, whether this Child is not Nullius Filius?

And what if he be born within lawful Matrimony, yet why is he not within the Stat. of 18 Eliz.? Is not the Child born in Adultery?

As to the Case of Still-born Children, that Statute is a penal Law, and to be taken strictly. Is it not an unconscionable Thing for the husband to keep this Child which was got by another Man?

Indeed, the other Exception requires some Consideration. If the Child be not a Bastard, the Order is ipso facto void; tis out of their Jurisdiction, they must take Care that it be a Bastard.

N. But the Justices have undertaken to say she was delivered of a Male Bastard-Child; and the rest stands indifferent whether he was here in the mean while, you will not intend it.

Shower. It would have been void, if you had only said, That she was delivered of a Bastard-Child.

Carthew 469,
470.
Comber. 418.

Ch. J. The Order must be quash'd; for it must appear, That he was not here all the Space. If he was here either at the Begetting, or at the Birth of the Child, it is sufficient. Let the reputed Father be bound over to appear here.

Mandamus to the Justices of the Peace and Overseers, to give Account of Money received.

Vide 2 Salk.
525, 531.

A Mandamus was granted to the Justices of the Peace, and to the Overseers of Shipton Mallet, to give an Account for certain Monies which they had received, &c.

The Justices and Overseers make a Return, That there was an Account given of their Monies, and that they had disposed several Sums in such particular Manner, &c. 2 Salk. 323.
6 Mod. 97,
98.

Per Cur'. Both the Return and the Writ of Mandamus are very ill.

Chief Justice. You should have said in your Writ, that you could not have your ordinary Remedy.

Turton, Justice. That ought to have appeared as well in the Writ itself, as upon the Suggestion of the Counsel at the Bar.

Coot *versus* Lynch.

THE Question in this Case was, Whether a Judgment given here (B. R.) upon a Writ of Error on a Judgment in Ireland, could be executed here in England for the Costs? For that Execution had been taken out against the Party who was here in England. 1 Salk. 321.
S. C.
Judgment in
B. R. here, on
a Writ of Er-
ror on a Judg-
ment in Ire-
land, where
to be executed
for the Costs.

Chief Justice. Whatever Judgment the Court gives here, must be executed in Ireland: Here can be no Testatum go into a Foreign County, the original Judgment being given in Ireland. Would you execute a Judgment by Piecemeals? Shall you execute an accessory Part of a Judgment, when the principal Judgment cannot be executed here?

Rokeby, Justice. Execution must follow the Nature of the original Action, and this Court is to send a Mandate to the Judges in Ireland, to see that the Judgment which was given here, be put in Execution there.

Chief Justice. I am of Opinion, that this Execution ought to be set aside, & sic per Cur' let Superseas go, Quia erroneice, &c.

Mr. Jennings's CASE of Clare-Hall.

Counsel moved, upon a Return to a Mandamus to the Masters and Fellows of Clare-Hall, to restore Jennings to his Fellowship on Mr. Dickens's Foundation. Vide 6 Mod.
18, 260, 363,
Post. 452,
453.

P p p p

They

They return their several Statutes, &c. and that by one of them the Chancellor is appointed to be their Visitor; and therefore the Master is not obliged to admit Mr. Jennings to his Fellowship, there being a Visitor.

Post. 453.

Wright. I take this Return to be very insufficient; for I agree, where there is a general Visitor, that he ought to be applied to: But here the Chancellor is only a Visitor to some particular Purposes, as appears by the Contexture of the Statute, which says, If a Man be guilty of such particular Crimes, why then in omnibus, that is, in all Things relating to those Facts, he shall be subject to the Chancellor.

Skin. Rep.

454.
Carrh. 93.
Mod. Ca. in
Law and Equ.
1st part, 183,
184.

Then the King cannot appoint a Visitor to any particular Foundation. Indeed, to Hospitals, &c. he may appoint Visitors.

So that it signifies nothing, though King James did make a Visitor; for the Countess of Clare did found this Charity in Provedionem Rei Literate. So that this is wholly a Lay Foundation, and it doth not appear to be for Spiritual Matters. So a Foundation ad Student' & Grand' is Lay, though it be ad Orand', for every Man is bound to pray to GOD.

Then the Statutes of my Lady Clare, who puts the Master and Fellows founded by her under the Power of the Chancellor, does not subject those Fellowships which were founded afterwards unto his Power. Therefore since we have no other Remedy, I hope we shall have a peremptory Mandamus granted by this Court.

Econtra. As for what he saith out of the Return, I shall not answer it.

First, I take it, that no peremptory Mandamus ought to go, for that he is not duly elected.

Secondly, Whether he be or be not duly elected, the Examination of it does not belong to this Court, but to another Jurisdiction.

These Fellows are the Founders Creatures, and must be subject to those Restrictions and Limitations as are prescribed by the Statutes, which say, That the Majority of the Fellows, and the Master, shall chuse; so that the Master's Consent is absolutely necessary: And here Dr. Blich is the Master, and does not think fit to consent and chuse Mr. Jennings Fellow. And here is nothing in the Statute to enforce the Master's Consent. 1 Rol.

Abr. 530.

As in Peterhouse there cannot be an Election without the Master's Consent. In the next Place, here being a Visitor appointed by the Statutes, this Court will not interpose.

If this Cause had related to the old Foundation, there had been no Doubt of it. Now it is said, that in Omnibus the Chancellor shall be Visitor.

Then, Proferri hic in Curia is not necessary to be in a Return.

Chief Justice. To what Purpose should it be produced in Court, when Nobody is here to demand Oyer?

As to the Merits of the Cause: How can they bring in Strangers, and make them subject to the Restrictions imposed by the Founder? Tho' there be a Visitor for the Fellows founded by my Lady Clare, yet, whether this Visitor shall be extended to the new Fellows? is the Question. Whether there must not be a new Incorporation of the second Fellowship founded by Dickens?

Rokeby. Dickens's Charity is to be disposed of by the Master and Fellows, but it does not seem to relate to the old Establishment. Adjourn.

Okell *versus* Sudlow.

THIS is an Action of Debt upon a Bond for 40 l. wherein the Plaintiff declares as Administrator to Thomas Rider, and sets forth, That Administration of all the Goods, &c. not exceeding above the Sum of 40 l. was granted to him by Dr. Cartwright, Dean Rural of Fradham, within the Diocese of Chester, who had a peculiar Jurisdiction, &c.

To this the Defendant pleads, That Thomas Rider had Goods, &c. to above the Value of 40 l. viz. to the Sum of 50 l. at Fradham, within the Diocese of Chester; and that the Bishop's Official had granted the Administration of all the Goods, &c. of Thomas Rider to Sarah Dutton, and traverses absque hoc that Dr. Cartwright, the Dean Rural of Fradham, had any Power to grant the aforesaid Administration to the Plaintiff as he had declared, &c.

Vide 6 Mod.
134. 145.
241.
Carth. 148.
1 Salk. 40, 41.
Power of a
Rural Dean
to grant Administration.

To this Plea we have demurred, and shew for Cause that it is double.

Chief Justice. You shew for Cause of Demurrer, that the Plea is double, and wants Form, &c. Now let them shew that the Plea is not double, nor wants Form.

Then, with Submission, it does not appear, that this Bond of 40 l. was out of the Peculiar's Jurisdiction at the Time of Rider's Death. It is said indeed in the Plea, that he died at Fradsham, but it is not said where this Fradsham was, whether within the Diocese or not.

Chief Justice. It does not say, it was out of the Archdeaconry.

Resp. It is a Dean Rural.

Chief Justice. But you should have shewn some special Matter to oust the Peculiar.

Resp. The Peculiar has only Jurisdiction of 40 l. and we have shewn, that the Testator had above 40 l. when he died, and traverse that the Dean Rural had Power to grant Administration; which is the Gift, and material Part of the Declaration.

It doth not appear he had above that Value within the peculiar Jurisdiction.

Then this Plea doth contain double Matter.

It is said, that Thomas Rider, at the Time of his Death, had above 40 l. at Fradsham; and also, that Administration was granted by the Bishop's Official, so that he has jumbled all together; and therefore the Inducement is ill with these several Facts jumbled together, when either of them alone might have been a good Plea, and a sufficient Answer to the Declaration.

Object. Then the Traverse is ill, for it is Matter of Law, whether the Peculiar has a Right, or not? Which cannot be tried by the Jury.

Resp. It is a Matter of Fact, whether the Peculiar has Power to grant this Administration, or not? Which we are willing to have tried, and we have no Way to try it.

The Case in Cr. El. 718. Jackson Lessee for Years by several Leases of Lands, some in the Diocese of York, and some in another Peculiar in the same Diocese, devises these Lands to his Son, and made his Daughter, a Minor, Executrix: The Mother administered durante Minori etate. Per Cur^{iam}, Administration shall be granted in two Places, viz. One within the Peculiar, and the other by the Archbishop of York; for the Archbishop shall not have any Prerogative here, because this Peculiar was first derived out of his Jurisdiction. Price and Simpson's Case. There this Case is express, that both these Jurisdictions are consistent, and that the Peculiar, and the Bishop too, may at the same Time grant out two Administrations; and so it was resolved in that Case of Price and Simpson.

But it is disputed, Whether this Peculiar had any Jurisdiction at all? Comb. 196.
2 Cro. 556.
Palm. 98.

Ch. Just. Not saying, it was out of the Archdeaconry, makes the Plea immaterial.

Let it stay.

Anonymus.

Ch. Just. IT was resolved lately by ten of us, That no Action of Debt lies in Westminster-Hall, for exercising a Trade, contrary to the Statute, out of the proper County. But the Prosecutor is restrained by the Statute 21 Jac. 1.

And we were also of Opinion, That this Statute 21 Jac. c. 1. only extends to Acts made before that Act, and not to subsequent Acts of Parliament.

By Lord Ch. Just. Hale was always of Opinion against the Case of Hughes, according to our Resolution. Vide supra.

Note. In a Case on the Statute of Limitations, the Lord Ch. Just. Hale cited the Case of Heyling and Hastings; which is shortly this:

The Executor brings an Action of Indebitatus assumpsit for Goods sold by the Testator to the Defendant.

Defendant pleads Non assumpsit infra sex annos; and in Evidence it appeared, That the Goods were sold six Years before the Action was brought, &c. but that the Defendant did say to the

Q q q q

Plaintiff

No Action
of Debt for
exercising a
Trade to be
out of the
proper Coun-
ty.
1 Salk. 373.
4 Mod. 145,
146, 164.
6 Mod. 128,
220.
1 Salk. 67.
2 Salk. 613.
ante 227.
Stat. of Limi-
tations.

Plaintiff when he demanded the Money, prove it, and I will pay you.

What amounts
to a new Pro-
mise.

Ch. Just. We are all of Opinion, That this is a new Promise, and shall charge the Defendant notwithstanding the Statute of Limitations. For to say, prove it, and I will pay you; is as much as to say, If the Goods were sold to the Defendant, I promise to pay you for them.

We are also of Opinion, That if a Man do acknowledge a Debt within six Years, tho' this is not a Promise, yet it is an Evidence of a Promise. As in the Case of Trover and Conversion, though a Denial be not a Conversion, yet it is an Evidence of a Conversion.

Mod. Ca. in
Law and Equ.
1st part, 172.

But see 6 Mod. 212. That the very Denial of Goods to him that has a Right to demand them, is an actual Conversion. *Per Holt, Ch. Just. vide 10 Co. 56. 1 Cro. 262. 4. 2 Salk. 555. 2 Mod. 245. 3 Mod. 2.*

DE

D E

Term. Sancti Hill.

Anno 10 W. 3. in B. R. 1698.

Parkhouse *versus* Forster.

T Respals. And on a Special Verdict the Case was: The Jury find, That the Plaintiff was an House-keeper at Tunbridge, and did let out Lodgings to Strangers, and did also furnish them with Stable-Room for their Horses, &c. and that the Defendant being a Constable, did quarter a Dragoon at the Plaintiff's House, for which this Action is brought.

1 Salk. 387, 388.
See now the several late Statutes touching Soldiers Quarters, &c. wherein there are particular Clauses for excepting Tunbridge, Epfom, &c.

Now the Question is, Whether the Defendant can justify this? And whether he hath acted in pursuance of the late Act of Parliament, made in the ninth Year of his present Majesty?

Before the fourth and fifth of William and Mary, the Bill-letting of Soldiers was wholly unlawful; but by that Act, and also by the 9th of W. 3. it is lawful for the Constable to quarter Soldiers upon publick Houses: But if the Constable billets them upon private Houses, a good Action lies against him, and there is all the Caution imaginable used, that private Houses should be exempt from quartering Soldiers.

4 & 5 W. & M. c. 13.
See 7 Geo. 2. c. 2. §. 35.
3 Car. 1.
31 Car. 2. c. 1.

And publick Houses have a different Consideration in Law from private Houses of this Nature; for a good Action will lie against an Innkeeper, for refusing to entertain a Stranger, Godb.

1 Show. Rep. 268, 269.
2 Rol. Abr. 84.
Kel. 50.
Palm. 367, 374.
2 Rol. Rep. 345.
345.
Hur. 200.

8 Rep. 32.
 Raft. 405.
 Moor 877.
 Heil. 49.
 Larch. 88.
 3 & 4 W. &
 M. c. 9. §. 5.
 Dyer 266.
 Cro. El. 622.
 4 Co. 123. b.
 Cro. El. 398.
 Moor 877.
 Noy 126.
 3 Bullf. 271.
 Cro. Jac. 224.
 Yelv. 162.
 Latch. 127.
 Poph. 178.

345. Pal. 367. 374. And an Innkeeper has no Piere for his Lodgings, and is answerable for any Goods of his Guests which happen to be lost infra Hospitum: But otherwise it is in Case of Lodgers in private Houses, for the Landlord there is not answerable for the Loss of their Goods; and before the late Act of Parliament, it was not Felony for a Lodger to take away the Landlord's Goods, tho' it was with a Design to steal them.

Then a Libery-Stable doth not alter the Case, for that is an Entertainment only for Horses, and not for Guests; and it is found here, that this Stable was only for the Use of the Lodgers; and the Stable being Part of the House, cannot be taken neither for a Libery-Stable, which is distinct from an House, as was ruled in the Case of the King and Marryott. So that we are not within the Consideration of an Inn, nor within any the four Particulars mentioned in the Act, which seem to describe Inns and Publick Houses. Vide le Act 9 W. 3.

Econtra.

This Action is brought against a poor Constable for doing his Duty, so that we shall be intitled to all the Favour the Court can give us.

And I take it, That this Case doth not depend upon the Construction of any the Acts of Parliament concerning Tipling-houses, but meerly upon the late Act of Parliament for billeting Soldiers.

Now they would exempt this House from quartering Soldiers, by saying, That this is not meerly an Ale-house nor a Libery-Stable, but it is of a mix'd Nature. Now if it be so to be taken, yet I shall shew it to you to be within the Act of Parliament.

But say they, This is not an House of Entertainment generally for all the King's Subjects, as Inns are; but if this Evazion should prevail, a great many Alehouses would confine their Business to a particular Sort of People: So the Inns near the River-Side would entertain none but Watermen; so an Inn on the Northern Road is not universally used, 'tis only for People travelling that Way; and yet I hope that this is an Inn to all Intents and Purposes within the Meaning of the Act of Par.

Parliament; and so at Epsom, and those publick Places, since they entertain any Body that comes there, either for the Ale, Pleasure, or Health, and they refuse Nobody that comes for either of those Purposes, they are as much within the Statute as any Inns whatsoever.

Another Reason is, That the Intention of the Act is to comprehend those that sold Ale by Retail in their Houses; and if he had sold Metheglin, he had certainly been within the express Letter of it; and why not in this Case? The Membra Dividentia of this Act are the publick Houses and the private Houses. If it is not a private House, it must be a publick House, there are no middle Sort of Houses.

Then I observe this upon the Declaration; that tho' the Gift of the Action is for Billetting a Dragoon upon the Plaintiff, yet it is not said that he was quartered there contra Voluntatem of the Plaintiff. Indeed, it is said, we caused the Plaintiff to find the Dragoon with Heat and Drink; but there is no such Thing in the Verdict, though indeed, there it is said to be against his Will, which is not in the Declaration; so that what is actionable in the Verdict, is not taken Notice of in the Declaration, and that which is actionable in the Declaration is not found in the Verdict. In the Verdict it is said, that it was against his Will; but not so in the Declaration. In the Declaration it is said, the Defendant caused the Dragoon to be in the Plaintiff's House, where the Plaintiff found him Heat and Drink; but it is not said so in the Verdict: So that one or other of them is defective, by Reason of which Defect the Plaintiff cannot recover.

Then the Constable is not responsible for consequential Damages. He shall not be answerable for the Outrages which the Dragoon may commit, who is a free Agent; and himself, for his own Injuries which he offers to any Person, must be responsible. Indeed, in the Case of a Beast, the Owner is answerable for all Damages that may be done by his Cattle, the Beast not being a free Agent.

But the Statute provides a Remedy for Damages done by the Soldiers themselves.

Chief Justice. If a Constable places a Dragoon where it is unlawful for him to do so, he must make Satisfaction for the consequential Damages; as if the Dragoon should, out of a Frolick, let the Drink about the Cellar, or do any other Prejudice, the Constable is responsible for the Damage that ensues; for since the placing of him there was unlawful, it shall be taken as if the Constable had put him there on Purpose to do an unlawful Act. Adjourn.

Afterwards, in Trinity-Term following, the whole Court were of Opinion, that the Action was well brought, and that Judgment ought to be given for the Plaintiff.

D E
Termino Paschæ.

Anno 11 W. 3. in B. R. 1699.

The King *versus* Dr. Burrel.

THIS is an Information against Dr. Burrel, for executing the Office of Censor of the College of Physicians, he not having taken the Oaths as the Statutes do direct. Vide 4 Mod. 233.

To this Information the Defendant pleaded Not guilty; upon which the Jury find a Special Verdict, which was very long: But,

The single Question is, Whether this be such an Office, and Place of Trust, as within the Statute of Car. 2. and the new Statute which requires the Taking of the Oaths? Ante 316, 317, 403. Stat. 31 Car. 2. cap. 1. & 25 Car. 2. c. 2.

Pro Rege. I hold this to be an Office within those Statutes.

I will consider the Nature of an Office. In the Latin, the Word *Officium* signifies the Place and Duty of it, and therefore an Office is generally taken for a Place of Trust: So in Statute Jac. 1. it is said, That no Popish Recusant shall exercise any Office or Charge. So Blount, in his Law-Dictionary. So Finch 13. 3 Jac. 1. c. 5.

Now I will consider whence this Office is derived.

The Royal Authority is the supreme Office and Charge of our Constitution, and of our Government; and has likewise under him the Care and Preservation of all his Subjects Healths; which Office, in this Particular, is exercised by the Censors of the College

College in Subordination under him; and therefore those who have any Branch of the Regal Office, ought to be termed Officers under him: So are Watchmen, &c. 9 Rep. 68. b. 22 Ed. 4. 22 And these Censors are not only Officers for the College, but they are designed for the publick Advantage and Benefit, to take Care of the People's Health, by superintending and correcting all Disorders against the Rules and Methods of Physick. So Judges, and those who inflict Punishment, are Officers: And the Statute saith, That the College of Physicians was incorporated for the Good of the Commonwealth. 15 H. 8. 5.

But it is objected, That an inferior Civil Officer, as a Constable, Watchman, &c. is not within those Statutes.

But this admits of an easy Answer, for these Offices are wholly servile and subordinate; but these Censors are Judges, and may fine and imprison, and make Rules and Orders, &c. and not altogether subordinate.

Econtra. I take it plainly, that this Office is not within the Statute, which has wholly a Reference to the publick Administration, that concerns the publick Peace, Manners and Government of the People; but these Censors are not Officers appendant to the Government, they only depend upon a private Constitution, which relates to the particular Science of Physick. It is an Office of Art and Science, and the principal Thing is Knowledge; it does not intermeddle with the Government, or with publick Affairs. It is no more an Office than a Schoolmaster's Place.

Then it was never known, that any of these Censors did at any Time take these Oaths; they never looked upon themselves to be within this Statute.

Chief Justice. The only Question is, Whether this be a publick Office, or not?

Rokeby, Justice. I don't think but a Popish Doctor may be a good Doctor to a Protestant Patient; but I do not think that a Popish Governor can be a good Governor for a Protestant Subject.

Chief Justice. Ay, but a Popish Censor is not so proper to superintend and inspect all the Protestant Physicians. Adjourn.

The

The Bishop of Chester's CASE.

THE Bishop had moved for a Prohibition to the Delegates, to whom he had appealed upon a Libel against him in the Ecclesiastical Court.

Now it was argued by Wright, Serjeant, That no Prohibition ought to go, for that the Libel here is concerning spiritual Matters. And without Question the Archbishop, as Metropolitan, hath the supreme Jurisdiction over the Bishops, and every Thing that calls itself Ecclesiastical. So saith Archbishop Whitgift, in his Reg. 177. which was printed in 1592. Indeed he talks there of the High Commission Court, but however as to this Matter it is the same Thing; for I confess the Archbishops are tied up only as to such Matters as come within their Ecclesiastical Consuance. And no Instance can be given where a Prohibition has been granted to restrain the Archbishop from reforming his Clergy in Matters of this Nature, which are mentioned in the Libel.

The first Charge against the Bishop is for Simony; and certainly this is singly and purely an Ecclesiastical Offence, and depends chiefly upon the Canons of the Church, as appears in Lyndewode 397. at the general Council of Chalcedon.

The next Charge is, for taking exorbitant Fees for giving Institution, which is wholly of a spiritual Nature; and by the 135th Canon it is expressly said, That no Money ought to be taken for Institution or Collation.

The third Offence is, for misapplying of Charities, and converting of them to his own private Use; though I do agree, That this Matter may be redressed in Chancery, upon a Commission of charitable Uses; but here the Design is to insist a Punishment on the Bishop for this Offence, which is not punishable in any other Place.

Q. If this be not Dr. War-
ton, the quon-
dam Bishop
of St. David's
Case.

And see 1 Salk.

106, 134,

294.

Farell. 36,

117.

11 Co. 49.

Carth. 484,
485.

Misapplying
of Charities.

scilicet

Fourthly.

False Certifi-
cate.

Fourthly. For certifying a Roll of a Colledge under his Episcopal Seal, in a Matter which very nearly concerns the Government; for he hath frequently certified that several Persons had taken the Oaths, when in Truth they had not taken them. This is the Case as it stands before the Archbishop; and I hope your Lordship will not prohibit the Archbishop from proceeding to enquire into these Offences, and to punish them by Ecclesiastical Censures.

1 Lev. 138.

It is true, they ground their Suggestion upon this, That these Matters are punishable in the Temporal Courts, as Sid. 317, 251. Prohibition on Suggestion, that the Spiritual Court sued out there for taking Letters of Dispensation; but the Truth is, it was to keep the bish because more Laicus; no Prohibition was granted. But this is no Objection, for the Prosecution here is of a different Nature, it is pro salute anime, as in 1 Keb. 151. 2 Keb. 213. Hob. Scarl and Williams, 288.

And suppose two or three of the Crimes mentioned in the Statute, of which I have only repeated a few, were of a temporal Nature; yet you will not grant a general Prohibition as to all; Indeed, a Consultation may be Quoad, &c. but a Prohibition Quoad, &c. is Rara avis in Terra. 1 Keb. 213.

1 Salk. 134.

2 Lev. 64.

Chief Justice. It is to be a Matter that relates to the Duty of his Office, as a Cause of Dispensation, &c. they may proceed; and so it is in the Case of Perjury by a Clergyman, he may be prosecuted in the Spiritual Court, though the Crime is of a temporal Consuance, but you will not go originally there.

Shower. Mr. Serjeant's Argument now, there are many Points very doubtful and difficult, therefore I pray that we may decide upon a Prohibition.

Chief Justice. If he was only punished there for a temporal Offence, it would be another Matter; but what was the Ground of Cowdry's Case? why he was punished for acting against the Duty of his Place.

C. Just. Always the Church has a Power to clear themselves. 31 Edw. 3. c. 4. In 2 Inst. 586. it appears, that in the Time of Hen. 6. the Clergy's Exortions were complained of, which were redressed amongst themselves. And the Case of Slader

Slader of Bromicham, Tr. 16 Car. 2. is a full Authority in Point; it was for forgoing Duty, for which he was punished in the Spiritual Court.

Rokeby. Suppose a Clergyman commits a temporal Offence by which he also acts against the Duty of his Place, shall we prohibit the Spiritual Court from punishing him in not doing his Duty? Davis Rep. in the Case of Properties, Fol. 3. b. you have good Learning as to this Matter.

Chief Justice. If you do enter your Suggestion on the Roll, you shall enter all the fact, that it may remain on Record for ever.

Wright, Serj. Their Design is only to delay us, and to get off for six Months. If they have any Thing to offer, I desire they may do it now, and enter it upon the Roll.

Chief Justice. Indeed, whenever you move for a Prohibition, it is supposed that the Suggestion is entered upon the Roll, though this is not practised.

It was said by the Counsel, if the Prohibition is not granted, we generally carry away the Suggestion in our Pockets. Adjourned.

At another Day this Case was again debated.

Chief Justice. The Ecclesiastical Men are governed by different Laws than other Men are; and therefore we are not to proper Judges of Matters of Fact set forth in the Libel, as the Simony and the Charity perverted, and the taking of Money for Ordination. Indeed, it seems strange that a Man should give Money for taking on him the Cure of Souls.

Shower. Here the Question is, whether the Custom being to take such and such Fees, and the Party takes more than the Custom allows, this is not comable here? Indeed, if he had done any Thing in general against the Duty of his Office, it might be otherwise.

Chief

2 Vent. 239.

1 Salk. 58,

551, 551.

1 Vent. 3,

120, 265,

274.

3 Cro. 810.

Cro. Car. 238.

Holt. 247.

1 Mod. 167, 176.

2 Mod. 268.

Ch. Just. I do not know why they should not try a Custom which relates only to an Ecclesiastical Person when a Lay Fee is not touched. So in the Case of a Pension by Prescription, there shall be no Prohibition granted, 2 Inst. But that is not the Case, for you have not suggested that you ought to take any Thing by Custom, you do not say there is any Custom for you.

Take a Prohibition, Quoad, &c. Per Cur.

The Ecclesiastical Jurisdiction as to Seats in the CHURCH.

Crook *ver.* Sampson, &c. Church-wardens.

Prescription

in Navi Ec-

clesia.

Vide sub Casu

proximo.

Mod. Ca. in

Law and Equ.

1st part, 338.

1 Salk. 551,

552.

Kaym. 246.

LIBEL in the Bishop's Court of Exeter, for a Seat which the Church-wardens assigned to one M. in whose Right the Plaintiffs claimed. The Defendants there, who now prayed the Prohibition, prescribed by a Que Estate for the Seat as ancient, and belonging to their Tenement in W. and that they, and all those, &c. had use to repair. It was doubted whether this Prescription in Navi Ecclesie be good; but in an Ile it were good. The Court inclined, That such a Prescription in Navi Ecclesie may be for special Cause; but they would not grant a Prohibition. 2 Keb. 92.

S. C. 6 Mod.

230.

Farell. 8.

2 Salk. 551.

Libel for a

Seat in the

Church.

Vide ante 69,

70.

Jacob and Dallow.

CAUSE shewed why a Prohibition ought not to go to the Ecclesiastical Court, where the Libel was for a Seat in the Church.

I take it, That the placing and displacing of People in the Seats of the Church, belongs purely to the Ordinary, unless there be a Prescription by one who has a Freehold. 2 Rol. Abr. 288. Hob. 69. 2 Bulst. May and Gilbert, where Prohibitions were denied.

Then some Prescriptions are also triable in the Ecclesiastical Court, as Modus decimandi, repairing of Churches.

I

Econtra.

Econtra. Where a Man shews a fixed Interest, he may have an Action on the Case, which must be tried at Common Law; for how can they in the Spiritual Court award Damages? Here is a direct Prescription, which they deny.

Vide 2 Salk.
550. pl. 12.

Curia. Take a Declaration, and see forth the Suggestion:

Suppose a Man has sat there for some Time, and he is disturbed, shall not he sue in the Ecclesiastical Court?

Defendant sheweth, That he and his Ancestors have used, Time out of Mind, &c. to have an Ale with a Seat in the Church, for himself and Family. This was on a Libel for a Seat in the Church. Cur. Because it appeared upon the Examination of the Party himself, that the Parish have always used to repair the Ale and Seat, the Court would not grant a Prohibition, for that proves his Ancestors were not Founders of the said Ale and Seat. Godb. 199. Moore 378. 12 Rep. Garraen and Pym.

Vide Farel. 8.
6 Mod. 230.
2 Salk. 551.
Skin. Rep. 7.

T C C C C D E

D E

Term. Sanctæ Trin.

Anno. II Will. 3. B. R. 1699.

The City of London and Vanacre.

By-Laws.
Vide ante,
105, 106, 107,
156, 157.
Raym. 447.
1 Mod. 10,
164.
1 Salk. 192,
193, 341, 352.
6 Mod. 123,
177.
4 Mod. 27,
28.
3 Mod. 193.
2 Jones 145.
1 Jones 162.
Carthew 68,
114, 115.
1 Vent. 21,
196.
1 Sid. 284.

Chief Justice. **T**HIS Case now stands for the Resolution of the Court.

It comes before us upon a Return to an Habeas Corpus; in which it is set forth, That the City of London is an ancient City, and are a Body Politick; and that King John, by his Charter did grant, that the Mayor and Aldermen should chuse any of the Freemen to be their Sheriffs. Then they return that Branch of Magna Charta which relates to the City, and the several Acts of Confirmation, &c. and that it has been a Custom, Time immemorial, for the Mayor and Aldermen to make new By-Laws for the Advantage of the City; and that in Pursuance of that Custom, in the 7th of King Charles the First, an Act of Common-Council was made, by which it was enacted in Manner following: That the Election of Sheriffs shall be annually on *Midsummer-Day*, and that no Citizen who is elected should be discharged, unless he will take an Oath he is not worth ten thousand Pounds; and that if the Person elected shall not appear at the next Court, and give a Bond of 1000 l. to take upon him the Office of Sheriff at the Eve of *St. Michael*, then next following, or shall refuse to take upon him the said Office, or shall not appear at the next Court, that then he shall forfeit 400 l. and if he does not pay the Sum within three Months afterwards, that he shall forfeit 100 l. more.

That Vanacre was chosen Sheriff such a Day, &c. but did not appear at the next Court, either to take upon him the said Office, or to make any Excuse for his Discharge, by Reason of which he had forfeited the Sum of 400l. And whether this Act of Common-Council shall be so far obligatory as to compel the Payment of this 400l. is the Question.

And though several Objections have been made, yet we are of Opinion, that this is a good By-Law, and that a Procedendo ought to go.

1. Obj. It is objected, That the Mayor and Aldermen in Common-Council, have not Power and Authority to make such a By-Law.

2. Obj. That it imposeth Hardships upon the Citizens themselves, in respect of this Oath, which they are obliged to take.

3. Obj. That it is unreasonable he should forfeit 400l. if he does not appear at the next Court and hold, unless they can excuse it, which, say they, makes them Arbitrary.

4. Obj. That here is no Provision made, that the Party shall have Notice of this Election, that he may have an Opportunity to excuse himself.

These are the Objections that have been made to this Return.

Now as to the first Objection; we are of Opinion, That this Privilege of making By-Laws and Ordinances is vested in the City by Common Right, if not by Custom, for that it concerns the good and better Government of the City, and every City and Town Corporate may, by an essential Power inherent to their Constitution, make By-Laws for the Advantage of the Government of that Body Politick; and this is the true Touch-stone of all By-Laws, which ought to be for the Administration of the Government with which they are intrusted. Hob. 211. Norris and Staps's Case. Though Power to make Laws is given by special Clause in all Corporations, yet it is needless, for I hold it (saith my Lord Hobart) to be included by Law in the very Act of incorporating; for as Reason is given to the natural Body for the governing of it, so the Body corporate must have Laws as a politick Reason to govern it, but those Laws must

Ob. 1. Response.

By-Laws may be made for the Administration of the Government, with which the Corporation is intrusted. Skin. Rep. 311.

Vide: Rol.
Rep. 365.
3 Leon. 264,
265.
Moore 576,
577, 580.
8 Co. 127.
Hard. 56,
210.
Carthew 68,
114, &c. ante.

must also be subject to the general Laws of the Realm, and subor-
dinate to it. See 3 Rep. 60. Chamberlain of London's Case.

Now it is for the Advantage of the City to have such a By-
Law, that the Sheriffs should be Men of Substance, that they
may be the better enabled to execute in great a Trust.

Then the very Constitution of King John's Charter gives
the City of London Power to chuse Sheriffs, and it would be
a vain Thing for the Charter to give a Power to chuse Sheriffs,
if they cannot be compelled to hold that Office; and therefore
the Persons whom the City nominates are obliged to stand.
So by the Acceptance of any Letters Patents, there is an Ob-
ligation on the Parties accepting to perform all Things thereby
required, as to undergo all Charges, Offices, &c. Certainly
these Citizens who were then in Being, when this Charter was
first granted, were obliged to stand, and so are all those who
come after.

Now if there be Letters Patents which grant to the Body
Politick an Exemption from Tolls, or Privileges of Fairs, Com-
mons, &c. yet all the particular Members shall take Advantage
of these Grants, though they were made to the Body Politick.
Therefore it is but reasonable that the particular Members, who
reap the Benefit of the Body Politick, should also take upon 'em
the Burden and Charge of Offices incident to it.

Then Nobody can question, but that this Constitution is for
the Advantage of the City; and therefore they must observe it
exactly, or else it is a Forfeiture of the whole Franchise; and it
is not in their Power to make an Alteration in their Constitu-
tion.

And to secure this Franchise, it is necessary for them to have
a Power to compel 'em to exercise this Office, or else this Fran-
chise will be lost; and that the Aldermen may make Ordinances
to enforce the Execution of their By-Laws, which are for the
Subservient of the publick Good of the City, appears in Snel-
ling's Case, 5 Rep. very full.

1 Co. 33.

Now as to Mr. Northey's Objection, That the Party refusing
to take upon him this Office may be impleaded, and that it was
held so in Norwood's Case.

First, This will not save the Forfeiture; for then there must be
a Vacancy in the mean Time of this Office of Justice; so that
they are bound to name such Sheriffs as shall stand, that there
may be no Failure of the Execution of Justice; and therefore
it is that they chuse Sheriffs so long beforehand, that if some
refuse

refuse to hold, they may choose others; so that there may be no Forfeiture of the Franchise.

Then here can be no Indictment grounded; for to refuse that he will not come and appear such a Day, will not do; for tho' he says to every Body, he will not come, yet he may come notwithstanding: And here he must come within such a Time, and acquaint the Mayor and Aldermen that he will stand, or else he must be fined.

But 'tis objected farther, That though they may make such a By-Law which shall affect the City, yet it shall not reach to the County of Middlesex, which is out of their Jurisdiction. But I take it, that this Act of Common-Council binds; for though the Execution of the Act be out of the City, yet it is for their Advantage, and the Persons of the Sheriffs are within the City, and the Sheriffralty is within the City of London, and its Jurisdiction, and the Interest of it.

The second Objection is, That it is unreasonable to impose this Oath, That he is not worth ten thousand Pounds.

Obj. 2.

But this is so far from being a Hardship upon the Citizens, that it is a Relaxation of a Burden which lay on them before; for heretofore, though a Citizen was worth never so little, yet he was bound to hold this Office.

Resp.

And so it was resolved in the Case of the City of Norwich, That a Man who was chosen Sheriff of that City was bound to serve in it, and that no Incapacity could excuse him; so that if he does not qualify himself by receiving the Sacrament, &c. it is his own Fault, and he shall be punished for not holding the Office. So is 1 Sid. 284. By-Law in London, that there shall be but 420 Carts let to hire in London; and that if any more be used, the Owners shall forfeit 40s. Per Cur. It is a good By-Law; for if the Number of Carts should not be restrained, they would stop the Streets, and be a great Nuisance. Player and Jenkin's Case.

1 Vent. 21,
196.
Vide Moor,
580, 585.
Pal. 3.
Hard. 55.
2 Brownl.
179, 278.
Cases in Law
and Equity,
339.
Skin. Rep.
381, 382.

But say they, What if the Person chosen to be Sheriff be a Madman, or a Fool, &c? Why, these Incapacities are excepted, they are tacitly excepted out of all Laws whatever, and therefore this By-Law shall not extend to such Persons; and the By-Law need not run, Provided that the Party to be chosen Sheriff be not a Fool, or a Madman; 'tis excepted without it.

U u u u

The

Obj. 3. The third Objection is, That he is obliged to appear at the next Court of Aldermen, and to hold the Office, unless he can shew a good Excuse to the contrary. This, say they, gives an arbitrary Power to the Court of Aldermen to allow or disallow the Excuse.

Resp. To this I answer, That this Part of the By-Laws is for the Advantage of the Citizens, for that they may make any reasonable Excuse that is consistent with their Constitution.

But suppose the Party who is chosen Sheriff makes a good Excuse, and they will not allow it: Why, he may either plead this, or give it in Evidence upon an Action brought, for it is not reasonable that the Party should be concluded by their Disallowance if the Excuse be reasonable: so upon that Case of the Commissioners of Sewers, their Discretion must be grounded upon Reason, and it must not be fanciful.

Obj. 4. The fourth Objection is, That here is no Notice given of this Election, and it may be that he was absent at the Time of the Election; and then 'twould be very hard that he must take Notice of it.

Resp. To this I answer, That every Freeman and Citizen, being a Member of the Body politick, is supposed to be present where the whole Body resides; and tho' in fact one of the Members should be absent, yet it was his Duty to be there, and he is supposed in Law to be there; he shall be obliged to take Notice of this Election at his Peril.

Then the Election is made in the View of the City, of which all Persons are to take Notice, as Members of the Body politick; and the Proclamation is also made in the most notorious Place of the City, viz. on the Hastings, where every Person may take Notice of it.

As in Case of Quilatory, the Supposition is, That the Tenant is commorant upon the Land, &c. and so at the 5th Exact that the Party is at the County-Court present.

So here, Is it not the same Case that the Freeman and Citizen of London are resident where the whole Body politick is assembled, and every Member of it is virtually and legally there, and all Acts done there conclude his Assent, and therefore he ought to take Notice of it. And suppose the Person so chosen was as York at the Time of his Election, yet he might have left Word with some of his own Family to give him Notice of it, and to apply to the Court of Aldermen to excuse him.

The mischief would be very great, if every rich Citizen might withdraw himself from the Service of the City against the Time of the Election, for then you would have nobody to exercise the Office of Sheriff.

I must needs say, That the Government of the City very much concerns the Good of the whole Nation, for that here the Trade of the Kingdom is chiefly managed, which ought to receive all the Care and Protection the Law can give.

I have advertised to inform you as to the Statute made by Law which has been made about the withdrawing themselves from the Service of the City; and I think there is one Act of Common Council, by which it is ordained and enacted, That if any Person doth willingly withdraw himself from serving any Office in the City, that he shall forfeit the Sum of one hundred Pounds, and also be disfranchised, unless he did come with six Compurgators, and declare that he went abroad about his lawful Occasions.

But notwithstanding all these Precautions, and that Elections have been always practised for many Ages in the Manner as is set forth in this Return, yet I know not the right Reason, there is a strange Temper of opposing this plain Method of electing Sheriffs amongst some of the Citizens. But as our Predecessors, who sat in this Place, have ever supported the good Government of the City of London, so we shall do the same, and I hope it will continue so when we are dead and gone. And therefore we are all of Opinion, That this is a good By-Law, and that Mr. Vane has fully forfeited the Sum of 100 Pounds for not complying with it.

Of Persons withdrawing themselves from the Service of the City.

Dom. Rex versus * Harniffe

[* The Defendant's Name said to be Harn in *Carib* 196.]

THE Case here was this;

Upon a Vi Laica removenda, a Parson had forcibly seized the Church, and upon Inquisition the fact was found; but the Justice of the Peace did not instantly restore the Possession, (as he ought to have done) but had a Record of it made up, and deferred the Delivery of the Possession for two or three Years.

And now all this Matter appearing to the Court, it being removed before them by Certiorari, they were of Opinion, That this Proceeding was very irregular, and that Restitution ought to be awarded.

Chief

8 Co. 119. b.
120. b.
2 Brownl. 266.
3 Bull. 139.
2 Just. 380.
Bro. Paux Im-
pris. 32.
Dett. 16.
Execution.
135. 6.
8 H. 6. c. 9.
Comber. 262.
263.
Carthew 496.
497. 5. C.

Chief Justice. I ground my Opinion upon the Authority in *Dr. Bonham's Case*, 8 Rep. which says, That the Commitment must be immediately. So upon the Statute of H. 6. of Forcible Entry, when the Force is found by the Inquisition, Restitution must be immediately. The Reason of one Case is the same with the other.

Rokeby. Where an Inquisition is taken, it is supposed there is a quicker Remedy, and therefore we think it is not in the Power of the Justice of the Peace to defer Restitution so long. The Act requires it to be done forthwith; and so is the Authority expressly in the latter End of *Dr. Bonham's Case*; it must be restored upon Clew.

Per tot. Cur. Let Restitution be awarded.

The City of York versus Toun.

Sir B. Shower. THIS is an *Indebitatus Assumpsit* for a Fine imposed upon the Defendant for not holding the Office of Sheriff in the City of York; but, with Submission, no *Indebitatus Assumpsit* lies in this Case; for how can there be any Possibility of Assent implied, when a Fine is imposed on a Man against his Will? Nor is there any precedent Consideration, neither do they shew any Right to this Fine, nor who imposed it, &c.

Holt, Chief Justice. We'll consider very well of this Matter, 'tis Time to have these Actions redressed. 'Tis hard that Customs, By-Laws, and Rights to impose Fines, and Charters, and every Thing, should be left to a Jury. Adjourn.

Turner versus Maine.

N. THIS is an Action of Debt brought by the Assignees of the Commissioners of Bankrupts, and it is not said that the Defendant had Notice of this Assignment.

Chief Justice. No Notice is necessary.

Econtra. How can we be guilty of a *Devastavit* to them, and yet do not know when the Assignment was made?

At

Vide ante
439. 440.
1 Co. 62.
Carthew 68,
114.

Vide 6 Mod.
131.
1 Salk. 111.
Carthew 29,
30.

At another Day,
It was insisted, this is an Action brought by the Assignee of
the Commissioners of Bankrupts, surmising a Devastavit, &c.
I take the Declaration to be ill.

1. It is not said where the Commission was.
2. It does not appear, that at the Time of Suing out the
Commission he was indebted.
3. It is not said any where in the Declaration, that the Ho-
ney was not paid to the Bankrupt himself.

Chief Justice. Read the Record—It is all well enough,
the Place is alleged.

And the Superinde is enough.

And for the last Exception, it is said, that Execution still re-
mains of the Debt.

Let the Plaintiff have Judgment.

X x x x

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Term. Sancti Mich.

Anno 11 W. 3. in B. R. 1699.

The King *versus* Chandler.

Indictment
for Deer-steal-
ing.
Vide: Salk.
182, 369,
378, 383.

Broderick. **T**HIS is a Condition of the Defendant for Deer-stealing; and several Exceptions have been taken against this Indictment.

1. That Hunting was necessary as well as Killing.
But I know not upon what Rule such an Exception is found-
ed, nothing of it appears in the Statute.

2. That it is Forisfacit instead of Forisfecit.
But that sure is nothing, for the Sense of the one Word is
as full and expressive as the other.

3. That several Sorts of Killing is lawful, as appears in
Manwood's Forest-Law.

But here it is set forth, That the Killing being within the
Park was unlawful.

But the two Things which seem to carry the fairest Appear-
ance of Objections, are these:

1. That the Day of the Killing does not appear.
But this signifies nothing, for if the Killing was within a
Year before the Indictment brought, it is sufficient.

Fitzgib. 124.
Carth. 406,
407, 501,
502, 508.
S. C.

to say, between such a Time and such a Time, is well enough; as in the Case of a Forfeiture for using and selling of live Cattle contrary to the Statute.

Besides, it is not practicable to set down the Day of the Month; and one of the Difficulties is, it is difficult to discover when the Act is done.

2. The second Objection that is considerable, is against the Form of the Indictment. It is said, that it ought to have been, that if there was not sufficient Discress found, that then the Offender should suffer Imprisonment.

But this is not of Necessity, for the Forfeiture is sufficient to be set forth in the Indictment. 1 Salk. 112, 381.
2 Salk. 681.

Chief Justice. It does not appear, whether the Conviction was upon Confession, or upon Evidence.

Broderick. It is said, we gave you a fair Opportunity of being heard, and that thereupon he was convicted.

Chief Justice. It seems to be well enough. Here the Act of Parliament designs a Summary Conviction before a Justice of Peace. 3 & 4 W. & M. c. 10.
§. 3, 4.

Anonymus.

Counsel shew'd Cause, why a Prohibition should not go to the Spiritual Court. The Foundation of the Libel was for a Rate to repair the Church, and there was a Sentence and an Appeal upon that. And now, after all this, they would have a Prohibition; but, with Submission, they come too late. Vide ante
389, 390,
82c.
1 Mod. 79,
194, 236,
261.
Raym. 146.
4 Mod. 148.
Hard. 379.
2 Jon. 112.
1 Vent. 367.
Comb. 254,
448.
Curth. 33, 34,
97, 142.

It is true, in the Time of the late King James II. there was an Act made for Building this Church, with Power to raise a Sum not exceeding 50,000l. so that they suggest, that there was Money enough raised by that Act, and that this Rate was illegally made; but your Lordship will not examine into that now. Therefore we hope, since here is nothing contrary to the Act for ought appears against Law, we pray the Rule may be discharged.

Econtra. I hope not, they shap'd a Sentence ex Parte in the first Place, but we go upon two Points:

2

First,

First, when the Act of Parliament, which prescribes a particular manner for raising the money, and therefore you cannot go to the Spiritual Court for it.

Secondly, it is a Rate declared to be made by the Clergy, and no Vestry could be called till the Church was finished. That which we insist upon is, that the Statute is not followed which prescribes particular ways of raising the money.

Chief Justice. Yes, what say you to that?

Resp. Our Suit is for the Repairing the Church, and not for Building of it.

Chief Justice. But what will you say to the Rate that is made for Repairing the Watch-house? Certainly that must be ill.

Resp. This money was not raised for the Watch-house, but for repairing the Church. There is indeed something of a Watch-house mentioned in the Libel.

Chief Justice. For that somewhat a Prohibition must go.

Give them a Declaratⁿ in a Prohibition.

Clement versus Beard.

Sir B. Shower. THE Libel in the Spiritual Court is for having married and cohabiting with his Wife's Sister's Daughter, which we say, is clearly prohibited by the Levitical Degrees. So is 1 Inst. 295. 8 Jac. 1. Rot. 1032. Jo. 2. 191. Noy 29. Hob. 181. Vaugh. 303. and many other Books.

It is said in some of the Books, That an Uncle might marry his Niece, but that a Man cannot marry his Aunt, by Reason of the Superiority which he has over him. I hope that we shall have a Consultation.

Chief Justice. What Superiority is there by an Aunt over her Nephew? What Ground is there for the Distinction? I cannot see any Difference between the two Cases. Now for your Case, it is certainly within the Degrees of Affinity; and in the same

R. C. 2 Jo.
118.

Cant. 271.
Cant. 200.
118.
Vide 2 Jo.
191, 213.
1 Lev. 254.
2 Vetr. 9.
Vaugh. 206.
Rot. 303, &c.

same Degree of Consanguinity, there would be no Doubt of it; for a Man cannot marry his own Sister's Daughter. I thought this Case had been settled, there is a Case against you in Point.

But indeed, if this Marriage be not within the Levitical Degrees, we are to bind the Spiritual Court from proceeding on a wrong Foundation. Adjourn.

Alanson *versus* Brookbank.

IT was moved by Mr. Northey, for a Prohibition to the Ecclesiastical Court of Durham.

Prohibition.
Hawk. P.C. 7.
1 Keb. 620.
1 Sid. 168.
Comb. 304.
Carth. 504.
2 C.
2 Salk. 625.
2 C.

This comes before your Lordship upon a Suggestion, That whereas a Libel was exhibited in the Spiritual Court of Durham against a Woman for living incontinently with my Lord, &c. Now the Ground of our Suggestion is, for that this Citation was served her on a Sunday, which is contrary to the express Statute of the 22 of Parliament made 25 Car. 2. by which it is enacted, That no Process whatever shall be served upon a Sunday, except in Cases of Treason, Felony, or Breach of the Peace.

So that since the Foundation of their Proceeding is so irregular, they ought not to go any further.

Indeed, they pretend that this Citation was well enough served, for that it was filed upon the Church Door according to the Custom. But as to that, we say, they have no Authority to file the Citation of any Person on the Church Door; but when the Party cannot be cited personally; and it does not appear here, that this Woman could not be personally cited, or that any Account has ever been made to cite her personally; so that this Citation has been wholly irregular, and consequently this Woman has been wrongfully excommunicated, and therefore we pray, that she may be absolved.

Then they object, That we might have insisted on this Act of Parliament in the Spiritual Court; but we say, we were not bound to appear there by Virtue of such an erroneous Citation, it being against an Act of Parliament — And a Citation is looked upon to be as much a Process as any Process whatsoever, in any of the Temporal Courts, as appears by 25 Ed. 3. Stat. 6.

And therefore, the one must be as much within the Act Car. 2. as the other; the Judges, we had the Opinion of the Court of Durham, that this Act of Parliament did not bind the Spiritual

Y y y y

Court. But I hope your Lordship will be of another Opinion, and think fit to grant a Prohibition.

I am told by the Civilians, that the Law and Custom of the Ecclesiastical Court is to fix the Citation on the Church-Door, and that this is sufficient without any personal Service; and that this has been the constant Practice both before and since the Statute of King Charles the Second, and we defy them to show any Precedent whenever any Prohibition has been at any Time granted since the making of the Statute, which was a great many Years ago.

Econtra. That is no Objection, for tho' the Custom has been so practised ever since the making that Statute, which, say we, has been a mischievous Practice, therefore it is high Time now to have it redressed.

Chief Justice. Indeed, the greatest Question is, Whether the Act of Parliament extends to this Process, which was used to be served in such a Manner by fixing of it at the Church-Door before the making of the Statute? And suppose the Ecclesiastical Law is, and has always been, to serve this Process on a Sunday, shall these general Words in the Statute take away their Law?

There may be some Cases to which the Statute may not extend; as for Instance, there is a Proclamation to be made on a Sunday at the Church-Door, by the Statute of 13 H. 2. Now this is not taken away by the general Words of the Statute; the Reason of serving the Citation in such a Manner on a Sunday, may be, for that they can't do it as well on any other Day in the Week. But the Case seems to be different in the Execution of other temporal Processes, which might have been as well served on any other Day as on a Sunday. So that it does not seem to be the Intent of the Statute to take away the serving this Process in such Manner.

But I do not like your Partiality in the Spiritual Court, for prosecuting the Woman only, and not my Lord, &c. Pray, why should not you prosecute him, as well as the Woman, if they are both equally guilty?

2. C. 2 Salt.

549.

2 Law. 1077.

Nell. Law.

337.

Action on

Stat. 13 H. 2.

for being ci-

ted out of the

Diocese where

he lives.

Machin versus Malton.

HERE the Case was, That Machin had substracted Citheas, as they say, within the Diocese of York, and then removes out of that Diocese to Lincoln, and lives there, and seven Years after his living there, they libel against him in the Spiritual

trial Court at York, upon which he brings Action upon the Statute 23 Hen. 8. cap. 9. for being cited out of the Diocese where he lives. Carth. 476.

And the Question is, Whether this is within that Act?

I take it, that this Case is not within that Act.

Indeed, the Design of this Act was to maintain the Jurisdiction of inferior Dioceses. Godb. 191. Fraums and Powell's Case. But where there is not a Remedy in the inferior Diocese, the Party may be cited to such a Court which has Jurisdiction of the Matter. And in Porter and Rochester's Case. 13 Rep. the Archbishop is reduced to his proper Diocese, or peculiar Jurisdiction, unless it were in five Cases; as in Default of the Ordinary; and in Case of Appeal; so if the Ordinary dare not, or will not, condemn the Party; or if the Ordinary be Party to the Suit below; or in Case of Instance and Request by the Ordinary. 2 Brownl. 1, 2. The same Case, in Case the Suit is begun below, and Sentence there given, and after, an Appeal upon this Sentence to the Delegates, and all this while no Endeavour to stay these Suits upon this Statute: The Legacy was sued for in the Prerogative Court, though the Parties dwell in another Diocese. Vide 2 Roll. Rep. 328. And in every one of the Cases expressed in the Statute, it is plain that Diocese and Jurisdiction are coupled together. So that it is evident, the World Diocese imports Jurisdiction, and not any Compass of Ground, as appears also by the Statute of 27 Hen. 8. c. 20. Winch. Entr. 570. 2 Roll. Rep. 448. and one sued for Tithes in the Bishop of Salisbury's Court, the other sues a Prohibition, for that he is in the Jurisdiction of a Peculiar; and that the Archdeacon is his Peculiar.

I take this Case to be expressly within the Statute, which was made for the general Case of the Subject from the Oppression of the Apparators. For before that Statute, the poor Subjects were worried up and down, and cited at great Distances from the Places where they lived, not only for defamatory Words, but also for the Substraction of Tithes, as appears in 1 Keb. 481. The Suggestion was, that the Party was cited out of the Country where he lived, which is not within 23 H. 8. the Cause of Action being Local for Tithes within the Diocese, and Consultation was awarded on Motion; and the Canons made 1603. take Notice of this Statute. 1 Lev. 96.
1 Roll. Rep. 329, 448.
2 Brownl. 121.
Winch. Entr. 570.
2 Brownl. 27, 28.

Then to say, here is no Jurisdiction in the inferior Diocese is false, for the Person may be sued in the Place where he lives, for the Substraction of Tithes in another Diocese; and so is

Vice-Chancellor shall be compelled to do his Duty, and to receive the Appeal.

Ad idem. That the Vice-Chancellor and Convocation are the ^{Vide ante} ^{421, 422.} Masters of this College, is without Question; for they are appointed so to be by the Statutes of the College, and by several publick Instruments: But it is a great Question, Whether these Masters have an absolute Power to condemn without Cause? Or whether it is not a limited Power to repobate for a good and lawful Cause? For the Act which constitutes visitatorial Power says, That they may condemn *ex causa legitima*.

Then it is impossible for Mr. Usher to come at his Right of Appeal, but by proposing it to the Vice-Chancellor; and since he hath refused to receive it, there is no other Way but for your Lordship to compel him to it by your Mandamus, that he may do his Duty; which now he declines to do, by stopping up the Channels of Justice.

Chief Justice. You are too soon for Argument: Let me know how the Case stands as to the Fact. Read to me your Constitution by the Statutes, that I may know how this Power is founded. Then the Statutes were read.

If you have any Mandamus at all, it must be directed to the Vice-Chancellor, Master and Scholars in Convocation.

Sir B. Shower. The Vice-Chancellor and Doctors of Divinity, and the Proctors, are without doubt Masters of this College, and the Vice-Chancellor and the two Proctors have three negative Voices; and if either of them refuse to accept of this Appeal, or to propose him to the Convocation, it cannot be done. ^{Ante 424.}

Then this Gentleman stands expelled out of the University for a particular Offence. And whether the Crime for which he was expelled be true or not, he has acquiesced under that Expulsion: So that now if this Mandamus should be granted, it would occasion a great Confusion in the University.

And we say, That this Gentleman is not capable of being received here, for that this is a Cause not examinable in this Place, there being proper Masters. And Mandamus's have been often denied, where it is plain that there is a Master to whom the Party grieved may appeal. Therefore we hope your Lordship will not grant any Mandamus.

Chief Justice. The Question is only this, Whether or no if an original Master refused to accept an Appeal, and to do the Party grieved Justice, we shall compel him to it? Let us be attended with the Statutes of the College, and we will consider of it. Adjournatur.

Note. Before we quash an Order of Sessions, we must have an Affidavit of Notice given to the Parties concerned, or else we will only quash Nisi on Notice.

The King *ver.* the Inhabitants of Chertsey.

Vide 2 Salk.
472, 473;
476, 478,
523, 524,
534-
Ante 330.
Carth. 396.
3 & 4 W. &
M. c. 11.

IT was moved to quash an Order of Sessions, for that the only Ground of settling a poor Person in a Parish, appears upon the Order to have been, for that the Banns of Matrimony of the poor Person were published in the Parish Church; which is ill, for that the Notice given to the Parish must not only be in Writing, but the other Ceremonies required by the Statute of 3 & 4 William & Mary, must be observed, and that Act being an explanatory Act, cannot be taken by Equity.

Cur'. Let it be quashed.

Capt. KIRK's CASE.

Vide Show.
190, 191.

THE Question was, Whether Captain Kirk, who was Indicted for the Murder of Conway Seymour, Esq; should be brought to his Trial this Term?

Chief Justice, I am of Opinion this Fact ought to be tried, for that, as I take it, the Prosecutor has been too dilatory in his Prosecution; and Men ought not to be restrained of their Liberty any longer than a convenient Time for them to be brought to Trial.

This Remissness in the Prosecution of Criminals was looked upon to be a great Mischief at the Common Law, and therefore was redressed by the third of Hen. 7. by which it appeareth, Justice ought not to be delayed.

But per Turton and Gould, the Trial ought to be put off, for that after his Surrender he did not give the Prosecutor timely Notice; and therefore he says, he is not prepared.

At another Day, Capt. Kirk was brought up by a Rule of Court; and it was moved by Mr. Montague, that Mr. Kirk might be admitted to Bail, for that he and the other Gentleman Mr. Cage were dangerously ill, by Reason of the Badness of the Air, and the Inconveniency of the Prisons; and that upon Proofs of such Matters the Court had frequently bailed Persons, though the Coroner's Inquest have found them guilty of Murder; and the Reason is, for that Imprisonment in such

Case

Case is not designed as a Punishment, but only to bring the Parties to Justice.

Reply'd econtra. It is true, your Lordship hath Power to bail in Treason or Murder; but you will not exert that Power, unless it be in extraordinary Circumstances: As in some Cases that have been quoted; and especially in such where the Prosecution is thought not to be well grounded.

But here is no Pretence of a malicious Prosecution, for that here are two Inquisitions for Murder found, one before the Coroner, and the other by the Grand Jury. And it is not doubted whether Mr. Seymour was killed by this Gentleman; that too plainly appears. Here is no Peradventure, whether this unfortunate Gentleman was killed by Captain Kirk; so that it is but reasonable he should give Account of Spilling his Blood.

Then here has not been any long lying in Prison, this being but the first Term after their Commitment.

The Blood of Mr. Conway is upon the Land, until it be revenged, or the Justice of the Nation be cleared by a fair Trial. I could remember your Lordship of a Case, where a Person, after he was out upon Bail, was taken up in the Vacation, and was committed, it being in the Case of Murder, meant in Mr. C.

Chief Justice. I was very well satisfied with what I did then, and am so still.

But indeed, in this Case I do not think that their Affidavits are full enough. It does not appear, that by this Imprisonment they are in Danger of their Lives.

It is said in Egerton's Case in the 13th of Jac. 1. That if there were any Delay in the Prisoners in the putting off their Trial, or in not giving timely Notice, there could be no bailing of them. And here, since they did not give Notice of their Render to the Prosecutor, as this is good Reason for deferring their Trial, so it is also the same for not being bailed.

Lane *versus* Cotton, Postmaster-General.

THE Plaintiff brought an Action against Sir Robert Cotton, Postmaster-General, wherein he declares he sent a Letter by the Post, &c. in which there was inclosed an Exchequer-Bill, and that this Letter and Bill was lost, &c.

Upon

Ante 323.
2 Jon. 210.
Ca. in Law
and Equ. 334.
Hale's P. C.
2d part, 129;
148.
Comb. 6, 111;
298.
2 Jon. 222.
Skin. Rep. 36.

S. C. 1 Salk.
17, 18.
Carth. 487.
S. C.

Upon the general Issue pleaded, the special Matter was found, viz. That the Letter and Bill were delivered to such a Postmaster, and that afterwards the Mail was robbed, and the Letter and Exchequer-Bill taken away, &c.

Upon arguing this Case, the Court seemed to be of Opinion, That the Action was well brought against the Defendant.

1 Sid. 35.
1 Rol. Abr.
338.
Pla. 3.
3 Mod. 323.
Skin. Rep.
278, 279.
2 Cro. 262.
Carth. 485.
Palm. 523.
Hern's Plea-
der, 76, 77.
Molloy 209,
212.
4 Rep. 84.
Owen 57.
2 Sand. 380.
2 Mod. 270.
Moor 462.
Co. Lit. 89.
Hob. 18, 24.
3 Mod. 227.
Hard. 485,
486.

Chief Justice. It would be very hard upon the Subject, if this Action should not lie. The Crown has a Revenue of 100,000 L. per Ann. for the Management of this Office: And therefore Care ought to be taken that the Letters be safely conveyed, and that the Subjects should be secured in their Properties. And why should not this be the same with a common Carrier, who must answer for Jewels or other valuable Things as he loseth, as appears in Aleyn's Rep. 1 Vent. 238. 1 Keb. 135. 1 Vent. 190, Raym. 220. 3 Keb. 72, 112, 135. 1 Mod. 85. 1 Sid. 245. 1 Keb. 852, 870.

Then it is very hard, that the Subject should be prevented by the Act of Parliament from sending his Letters by any other Carrier against whom he might have his Remedy, and yet not have his Remedy against the Postmaster, by whom he is obliged to send his Letters.

But I was informed, that afterwards Judgment was given in B. R. for the Defendant. Dissentiente Ch. Just. Holt.

See the Reasons of Holt's Opinion, 1 Salk. 18, 19.

DE

Anno 2 Will. & Mar. In B. C.

Tippet and Eyres.

Argued by the Judges.

IN Debt sur obligat. for 300 l. It appeared upon Oyer to be for the Performance of an Award to be made by Barlow before the 4th of April, or else to the Ampirage of such a one as he shall choose, to be made on or before the 16th of April.

The Defendant pleaded, That neither the Arbitrator, nor the Ampire, made an Award, Prout, &c.

Plaintiff reply'd, confessing the Arbitrator made no Award; but on the 4th of April they did choose and nominate one Gyslop to be Ampire, who refused; and then they named one Clerk, who accepted and awarded, &c. and sets forth a Breach on Demand.

Vide 1 Sid.
428, 455.
1 Lev. 174.
285, 302.
Raym. 187.
1 Mod. 15,
275.
2 Mod. 169.
2 Jon. 167.
1 Salk. 70, 72.
2 Saund. 64,
65, 130.
Comber. 21,
103, 213.

Argued by the Judges.

Ventris. I am of Opinion, That the Award by Clerk is good, for the Submission has put the Matter to the Determination of an Ampire, and I think this Ampire is sufficiently named by the Arbitrators intitled to the Power. It's true, it's said they named Gyslop, and it's as true he did not accept thereof, and therefore could be no Ampire; and that an Acceptance is requisite the Manner of pleading proves.

But 'tis objected, That this is an Authority, once executed, which cannot be acted over again. I do agree, that an Authority once well executed cannot be translated anew; but where it's not well executed, it may be acted again: As where Executors by Devise have a bare Power to sell Land, though they make a Feoffment, yet they may afterwards sell; and in our Case the naming of Gyslop is only a Commencement to the Execution of his Authority. Two Persons cannot have a concurrent Jurisdiction to make an Award. 1 Rol. Abr. 261.

Rokeby. Gyslop had never any Authority vested in him, for his Refusal prevented it; so, as I take it, the Cases of Authority do in no wise influence the present Case. The Arbitrators had an Authority to make an Award till the 4th of April, and then they had a

A a a a a

Power

Power to name an Umpire; for Gyssop had no more than a Communication, &c.

P. J. The Nomination of Clerk was good; for Gyssop's was wholly avoided by his Refusal, and for that it is fit we should compare it with other Cases of Authorities; as where the Lessee for Years will not consent to the first Livery, the same Attorney may make Livery again. Pal. 288. *Molyneux versus Tolin*. And so if Lands be given to J. S. the Remainder to such a Person as he shall appoint, and he appoints a Monk, he may notwithstanding appoint again. So of Elections, a void Election is adjudged to be no Election.

Ch. J. Pollerfen.

I agree, That if there be only a Communication or Discourse between them, that would not have amounted to a Nomination; but Parols font plea, we must take it as it appears in the Record before us, and that says there was a Nomination, and if there had been none, the other Party could take Advantage of it upon Issue. And I do agree, that an Authority ill executed may be readed, as in the Case of Attorneys.

But the Arbitrators in our Case have no other Power than to nominate; which they have done, and I cannot imagine Gyssop's Refusal should give them a new Power.

I know no Difference between this and other Powers: If the Refusal makes the Nomination void, it must be immediately void, or else they have no Power to make a new one; and if it does, then it argues that they have a greater Power than the Submission gave them, which was only once to nominate, which they have done.

Carthew 412,
413.

I take it, That where a Man has only a bare Authority, and no Interest, his Refusal shall not disable him from executing it: As if an Executor, or an Attorney, in the Cases beforementioned, should say they should do nothing, that will not discharge their naked Power. 14 Hen. 7. 17. *Albany's Case*.

1 Sid. 428,
455.
Raym. 187,
205.
1 Lev. 285.
1 Mod. 15,
257.
2 Mod. 169.
2 Jo. 167.

So that this Consequence may follow our Case, that Gyssop after his Refusal may notwithstanding make a good Award; and if Clerk may do so too, there will be two Umpires well chosen, and a concurrent Jurisdiction, which is not allowed. 1 Sid. *Bernard versus King*. So 2 Saund. 130. *Coping's Case* is very strong. But since my Brothers are against me,
Judgment pro Querente.

INFOR-

INFORMATION.

Mr. Prynne's Case.

AN Information was exhibited in the Crown-Office against seventy poor Persons; which sets forth, That one Mr. Prynne was Lord of such a Manor, where the Defendants did assemble and meet together in a riotous Manner, and pull down certain fences, &c. to which one of the Defendants comes and demurs. The Question is, Whether an Information lies for this Riot?

Information
in the Crown
Office.
Comber. 18,
193, 477.
3 Mod. 72,
73, 117, 118.

Sir Fr. Winnington.

I conceive it does not, and that the Defendants cannot be proceeded against otherwise than by Indictment or Presentment in the Country where the Fact was committed. And this I shall make appear:

1 Vent. 8.
1 Sid. 360.
1 Salk. 372.

First. By the ancient Books of our Law; as Glanvil, cap. 1. Fleta l. 2. cap. 62, 102, 103. Magna Charta 29. 2 Inst. 46. No Man can be charged but by Indictment or Presentment. So are the Statutes 25 Edw. 3. 4. 42 Edw. 3. 3. 5 Edw. 3. 9. So in the Year-Books of the 26 Edw. 3. 4. 70. 43 Ass. pl. 5. all Suits of the King must be by Presentment or Indictment.

I shall come now to shew to your Lordship, from whence these Informations had their Birth, and how they had their Names.

King Henry the VIIth was a very rich Prince, and used all the Care and Industry imaginable to encrease his Coffers: The Instruments he made Use of for this Purpose, were Empson and Dudley; who, in order to acquire their Designs, procured an Act of Parliament to be made, empowering Justices of the Peace, &c. upon Information for the King, to hear and determine all Offences and Contempts, except Treason, Murder, and Felony.

You will find the Statute at large, in 11 Hen. 7. 3. Rastall's Statutes: But this very Act was afterwards repealed, and condemned as injurious and oppressive to the King's Subjects, by 1 Hen. 8. 6. And the Authors themselves of those horrible Oppressions and Grievances, viz. Empson and Dudley, came both to infamous Ends, for they were very fairly hanged; so there was an End of them and their Informations.

In all Rastal's and Coke's Entries, there are no Informations, but only upon general Statutes; and in Rastal, I think there is hardly one Information.

1 And. 156. 4 Inst. 41. No Man ought to be punished, but by Presentment or Indictment.

Now I shall come down to the Petition of Right, 3 Car. 1. which establishes and confirms the Liberty of the Subject, and that no Man should be tried but by legal Process; and enumerates many Things there, wherein the Liberty of the Subject was invaded. But the King perceiving that the Parliament strook very deep, and he being tender of his Royal Prerogative, presently dissolves them, and did not call them again till the 16th Year of his Reign; it was in this long Interval of Parliament, that this Mischief crept in. The first Information begun 5 Car. 1. being exhibited against my Lord Holles, Elliot, and others.

Cro. Car. 130,
152.

Their Counsel then insisted against the Attorney-General, That though the Crime was punishable, yet he ought not to have proceeded by Information, but by Indictment or Presentment: The Attorney told them, there were many Precedents, but produced none. 1 Croke, King and Winckfield, 251. 80. Car. Lamb's Case, 1 Cro. Freeman's Case.

After the long Interval of Parliaments (the Intermision of which was certainly the Cause of many Irregularities both in Church and State) then comes the 16 Car. 1. in the Year 1640. and the Parliament presently abolished the Star-Chamber-Court which had so long oppress'd and harrassed the Subject by their mischievous Informations, and other arbitrary Proceedings; of which the Parliament were so sensible, that they enacted, Than no Court of that Nature should ever again be set up in England. That Parliament also takes Notice of the Petition of Right.

After this, Informations seemed to be totally lost, but certain it is they slept till the Restoration of King Charles II. After which they were sometimes made Use of, tho' but very rarely neither; for they received but little Countenance from the Reverend Judges, with one of which I had the Honour to be acquainted, and that was my Lord Chief Justice Hale, who I remember very well has often said, That if ever Informations came in Dispute, they could not stand, but must necessarily fall to the Ground.

The Reason why Informations were so seldom questioned, is because they were very rare; and when few People are pinch'd, few do object. But I confess, of late Times they have been more frequent than ever, and the Mischiefs they produc'd are yet fresh

in our Memory. I will not trouble your Lordship with a long Repetition, but I cannot pass by two or three of them without mentioning. As first, that of Sir Samuel Barnadiston, against whom an Information was preferred, only for writing a merry Letter to some of his Friends in the Country, for which he was fined 10,000 l. So about the Election for Sheriffs, an Information was exhibited against Pilkington, Shute, and others, and they were fined extravagant Sums, for nothing, but because they would not betray their Country, by voting for such Sheriffs as would be subservient to the then Court, Faction, and Perogative Interest.

See the Collection of State Trials.

So I remember one, for only drinking to the pious Memory of Stephen College, was presently attacked by a furious Information, and had an exorbitant Fine imposed on him for so slight and scholastic a Matter.

Besides the arbitrary Proceedings of these Informations, many other Inconveniences do attend them.

1. The Party, if he be acquitted, cannot have any Costs against the King, but after an expensive troublesome Suit, must sit down contented with his own Loss, and be glad he escapes so.

2. If a Man come into Court upon his Recognizance, he must plead Instantly, though he cannot possibly be prepared for it, having never before heard the Information. And this was my Lord Russel's Case.

I cannot (my Lord) conclude, without mentioning the late Case of the Reverend Bishops, whom the Information brands for presenting a malicious, seditious, and scandalous Libel; which, in Truth, was nothing but a pious and humble Petition, and which they were obliged to do, by the Laws of GOD and Man. Certainly, no Jury could have ever found them guilty.

I suppose it will be objected against me, That there are many Precedents of Informations in the Office. But I answer in the Words which a great and learned Lawyer heretofore used, 1 And. 157. Nil agit exemplum quod litem lite resolvit.

Wherefore, my Lord, relying on the Authority of these Statutes which I have quoted, none of which (as I ever heard of) are yet repealed, and in respect also of those Inconveniences which are the essential Concomitants to all Informations; I pray your Lordship's Judgment for the Defendant, not only for

B b b b b b

my

my Client's Sake, but for all the Gentlemen's at the Bar, nay, for all the Subjects of England; that our Liberties may not be invaded, nor our Properties trampled on, and our Lives snatch'd away by these oppressive Informations.

Sir William Williams, pro Rege.

Sir Francis Winnington's Argument is, I suppose, extemporary, and so I shall answer it.

The Matter on which this Information is grounded, is a Riot, for which I think the Information will very well lie, and is no Innovation; for the Officers of the Court will inform you, that there are Precedents of Informations as ancient as Indisements.

As to the Case of Empson and Dudley, the exhibiting of Informations was not alledged as a Crime against them, but it was for compounding of Informations, and mixing popular Actions in them. It is true, in capital Cases, Informations do not extend, and where the Statute saith, They shall not lie for Life or Limb, it implies, that they did lie in other Cases.

The Reason why the Court of Star-Chamber was repealed, was, because there was nothing punishable there, but what could be remedied by the Common Law in the King's Courts, and not because they proceeded by Information.

See Vaughan's
Report of this
Matter, at the
End of Cro.
Car.

So as to my Lord Hollis's Case, there the Information was preferred against him, and others, for assaulting the Speaker in his Chair, and for speaking seditious Words in the House, for which Judgment was given against them. And afterwards, in 1667, that Judgment was reversed by the House of Lords; but the Reason of that Reversal was, because this Court had intermeddled with Matters done in Parliament, and because the Attorney did craftily intermingle Matters in the Information, and not because he proceeded by way of Information.

And though I grant, that Informations have sometimes been misused, yet the Abuse of a Thing will not destroy it; but if there be any Irregularities committed, your Lordship will reduce Matters to their old Stamp and Method, and the Court may do it in their Discretion.

As to my Lord Hale's Opinion concerning Informations, I heard him make this Distinction between an Information and an Indisment: In the first, every Person gives a distinct Fee; but in the last, one Fee lies only for several Persons. By this, my Lord Chief Justice Hale granted, that an Information would lie; and truly I never heard it questioned before this Time.

As for the Information concerning my Lords the Bishops, those Epithets of malicious, seditious, &c. were only Words of Form and Course, though I will not undertake to justify the Proceedings of the late Government: We have all done amiss, and must wink at one another.

Sir George Treby, Attorney General, pro Rege.

I never heard Informations questioned before; it is certainly a Doctrine very lately broach'd, and I believe will have very few Proselytes to espouse its Interest.

Ca. in Law
and Equ. 101.

As for the old Statutes which Sir Francis Winnington cites, how that all Proceedings shall be by Indictment or Presentment, Alby may not Presentment there be meant of a Presentment by the King's Attorney, which is nothing but an Information?

The Proceeding by Information has been constantly practis'd, and therefore is now the Law of the Land, and it is not created by the 11th of Hen. 7.

Skin. Rep. 47,
60, 109, 111,
584, 585,
637.

In Rastall's and Coke's Entries, there are many Informations, some for Intrusions, and others in Nature of a Quo Warranto. So the Statutes that do restrain Informers, do suppose, that there were Informations before.

As for my Lord Hollis and Selden's Case, that was, whether an Information would lie for a Matter transacted in Parliament?

Cro. Car. 130,
131, 152.
Hob. 115,
109, 111.
Dyer 93, 98,
370.

As to my Lord Hale's Opinion, I am sure there were several Informations in his Time; and he was a very conscientious Man, and if he had thought that Informations were wholly unlawful, he would not have suffered them: But indeed, I have heard him tell the Officers of the Court, that the Informations should not be verations, but never that they were illegal.

All the Records in the Crown Office are so many Authorities for us.

Ch. Just. Holt. The Matter truly seems not of any great Difficulty, for we shall hardly come now and impeach the Judgment of all our Predecessors; it would be a Reflection on the whole Bar. In Lamb and Winfield's Information, there were learned Counsel who would certainly have taken Exceptions to the Information, had they thought that it did not lie.

Mod. Ca. in
Law and Equ.
1st part, 58,
114, 119,
186, 283,
326.

My Lord Chief Justice Hale complained of the Abuse of Informations, but not that they were unlawful. As to the Statute of Hen. 7. I do not think that the Star-Chamber was set up then, but was at the Common Law, and so Informations in that Court, and others, were at the Common Law. So notwithstanding

Carth. 14,
226.

standing the Statute of 11 Hen. 4. by the 1st of Hen. 8. yet afterwards the 2d of Hen. 8. of Maintenance, supposeth, that Informations lay; and if it had been a new Thing, that Statute would have said, that there shall be an Information for that Crime, and not that it shall be punished by Information, which supposeth Informations to lie. You could never move to quash an Information against the Attorney, but an Indisment you may. A Man may make a better Argument against Writs of Enquiry, and new Testis, than against Informations.

Dorset Justice. There was an Information against Plowden, who was a learned Man, and a great Lawyer, and if he had thought Informations illegal, he would certainly have taken Advantage of it.

I confess, that in that long Interval of Parliament, which Sir Francis Winnington mentions, between the 5th and 16th of Car. 1. there were more Irregularities committed in this Court, than ever were before. Then the Business of Ship-Money was transacted in this Court.

The next Term after, this Question was moved again.

1 Sessd. 301,
302,
2 Mod. 128,
132.

Chief Justice Holt. Informations were at Common Law, and so the Statutes do suppose: The Court of Star-Chamber was taken away, because the Crimes were punishable here. But a Crime committed in York cannot be punished here by Indisment, for it cannot be removed out of the County, where all Indisments must be laid; therefore it is only punishable here by Information.

In the Books of Entries there be Informations for Perjuries and Intrusions against the Bailiff of Westminster, and Keeper of the Gatehouse, and yet they are no Officers of the Court.

All the Court were of Opinion, that Informations lay at Common Law.

And see 1 Salk 374. That where-ever a Matter concerns the publick Government, and no particular Person is intitled to an Action, there an Information will lie.



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A TABLE OF THE Principal Matters.

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